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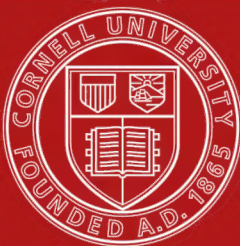
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The statutory law of decedents' estates



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THE STATUTORY LAW
OF
DECEDENTS' ESTATES
IN PENNSYLVANIA

WITH ANNOTATIONS AND FORMS.

EDITED BY

RAYMOND M. REMICK

OF THE PHILADELPHIA BAR

GEO. T. BISEL CO.,
PHILADELPHIA,
1922.

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PREFACE

By the Act of April 23, 1915, (P. L. 177) the General Assembly of the Commonwealth of Pennsylvania authorized the Governor "to appoint a Commission of three persons, learned in the law, and one of whom shall be an orphans' court judge in commission, to codify and revise the law of decedents' estates whether testate or intestate, and to report the same to the next General Assembly, and to recommend such changes in the existing law as may to such Commission seem advisable."

Acting under this authority, on October 4, 1915, Governor Brumbaugh appointed Hon. John Marshall Gest, then and now a judge of the Orphans' Court of Philadelphia County, Hon. George E. Alter, the present Attorney General, and Hon. Thomas J. Baldrige, the President Judge of Blair County, as Commissioners to carry out the purpose of the act. The wisdom of his choice is best demonstrated by the results of their labor.

The Commission appointed Samuel D. Matlack, Esq. of the Philadelphia Bar, its Law Clerk and Secretary, and through him presented its printed report to the Assembly on February 1, 1917.

It is an indication of the painstaking and valuable work of this Commission that the General Assembly of 1917, enacted without change (except as noted in Section 391 and the end of Section 623 herein) the acts which were offered by the Commission for its consideration. The acts were all approved on June 7, 1917, and include the "Orphans' Court Partition Act," (P. L. 337); the "Orphans' Court Act," (P. L. 363); the "Revised Price Act," (P. L. 388); the "Wills Act," (P. L. 403); the "Register of Wills Act," (P. L. 415); the "Intestate Act," (P. L. 429); and the "Fiduciaries Act," (P. L. 447). On the 11th day of July, 1917, there were approved two acts one (P. L. 755) amending Clause 2, (a) of the Intestate Act, and the other (P. L. 790) providing that fiduciaries having an interest in any coal-mining lease may, with the approval of the court, sell, assign, alter, modify and supplement the same under the same procedure as that prescribed for the sale of real estate under the Revised Price Act.

Several minor changes have also been made by the Legislature in its sessions of 1919 and 1921. Otherwise the code as drafted and presented by the Commissioners remains unchanged, an everlasting monument to their industry and ability. Some idea of the

value of this codification and revision to the bar may be gained from the fact that it supersedes two hundred and eighty-seven former acts repealed absolutely or in part.

The Commissioners, in their report, embodied certain preliminary notes to the report as a whole and also with respect to each act. Also, in connection with each section as presented, they annexed an explanatory remark and a statement as to the former law which the proposed section was intended to supersede, together with a reference to Purdon's Digest where the former act had been annotated, and in certain cases, to the decision of the court which impelled or suggested the proposed change or new enactment. These comments by the Commissioners, are, to the practitioner, of inestimable value in construing the act and applying it to present cases in the light of former precedents. With the consent of the Commissioners these prefatory remarks and sectional notes have been embodied herein verbatim.

The value of these notes by the Commissioners, to the bench and bar in construing the acts may be gained from the following extract from an opinion of Mr. Chief Justice Moschzisker in *Miles' Est.*, January 3, 1922, S. C. October Term, 1921, Nos. 61 and 62, not yet reported:

"While it is well settled that courts may not resort to views expressed by those who either draft or enact laws, for the purpose of determining the meaning of the words employed therein (see opinion of the court below in *Com. v. Mathues*, 210 Pa. 372, 392, and authorities there cited), yet, in order to get at the old law, the mischief and remedy, and properly to understand and construe a statute embodying the latter, the history of the enactment in question may always be considered; and when the statute under consideration is a general revision, 'the law as therein written will be deemed to be the same as it stood prior to the revision, unless we find from the statute itself, or its history, a clear intention to change it;' In *re Lis's Estate*, 139 N. W. 300, 302, and cases there cited; also see authorities in 36 Cyc. 1223.

The United States Supreme Court has recently decided, in *Duplex Printing Press Company v. Deering* (advance opinion of February 1, 1921, pp. 182-3), that the report of a committee, having a bill in charge during its passage, "may be regarded (judicially) as an exposition of the legislative intent in a case where otherwise the meaning of a statute is obscure;" but it is not necessary to express our views on this point or resort to such an expedient in the case at bar, for, as already shown, when the history of the legislation and all cognate parts of the present act are considered together, the meaning of the statute becomes reasonably clear. We may add, however, that when the report of the commission which drafted the present act (The Intestate Act) is examined, to ascertain what that body was endeavoring to express (a course pursued by

this court in *McDowell v. Addams*, 45 Pa. 430, 433, when construing the old Intestate Act of 1833; see also *Whitaker's Estate*, 175 Pa. 139, 140-2, and in *re Lis's Estate*, *supra*), it is of interest to observe that the notes, on the several sections of the act to which we have referred in this opinion, show the intention of the original draftsmen, so far as the meaning of these parts are concerned, is borne out in the construction placed upon their work by the court below, and concurred in here."

No attempt has been made to digest the cases construing the former acts of assembly replaced by the present Code as this has been accomplished in *Purdon's Digest*, to which reference is herein given. There have been added a digest of the cases construing the sections of the acts as the same have been reported, a comprehensive index, table of cases, citation of cases and lists of acts amended or repealed and a collection of forms.

This work purports to include all amendatory acts of 1919 and 1921 and all reported cases down to December 31, 1921.

The editor acknowledges with thanks the assistance of Harry C. Reynolds, Esq., and Joseph A. Lamorelle, Esq., of the Philadelphia Bar, in verifying the citations of authorities, etc.

R. M. REMICK.

TO THE GENERAL ASSEMBLY OF THE COMMONWEALTH OF PENNSYLVANIA :

The undersigned were on October 4, 1915, appointed by his excellency, the Governor, in accordance with the Act of April 23, 1915, P. L. 177, as Commissioners to codify and revise the law of decedents' estates, whether testate or intestate, and to report the same to the next General Assembly, and to recommend such changes in the existing law as may to such Commission seem desirable. We have now the honor to submit our report, which we beg leave to preface with a few explanatory remarks.

On March 23, 1830, the General Assembly adopted a joint resolution, printed in the Pamphlet Laws of 1830, page 408, by which the Governor was authorized to appoint three persons as Commissioners to revise, collate and digest all such public acts and statutes of the civil code of this State and all such British Statutes in force in this State as are general and permanent in their nature. In accordance with this resolution the then Governor, the Honorable George Wolf, appointed William Rawle, Thomas I. Wharton and Joel Jones as such Commissioners, who subsequently reported a large number of draft Acts, five of which, relating to our present subject, were substantially adopted by subsequent Legislatures as the Act of March 15, 1832, P. L. 135, entitled An Act Relating to Registers and Registers' Courts; the Act of March 29, 1832, P. L. 190, entitled an Act Relating to Orphans' Courts; the Act of April 8, 1833, P. L. 249, entitled An Act Relating to Last Wills and Testaments; the Act of April 8, 1833, P. L. 315, entitled An Act Relating to the Descent and Distribution of the Estates of Intestates, and the Act of February 24, 1834, P. L. 70, entitled An Act Relating to Executors and Administrators.

These acts were drafted with great care and consummate skill, and have served for over eighty years as the substratum of our law of decedents' estates and connected subjects; but during this long period of time the law has been amended by the passage of more than two hundred Acts of Assembly, has been elucidated and applied in countless judicial decisions, and has been necessarily affected by the cumulative changes in legal practice and public opinion. The present would therefore seem an appropriate time to re-examine the entire subject, to repeal statutes which are either dead letters in the books or prejudicial in their effect, to consolidate

those that should be retained and to revise the entire system by the cautious introduction of new legislation.

The act under which we were appointed uses the words "to codify and revise"; and as the word "code" is often used in different meanings, we beg leave to observe, that as we have understood the legislative intention, we were not expected to reduce to the form of a code those general principles which lie at the basis of jurisprudence, a task that would indeed be beyond our powers, even if its accomplishment were desirable. We have considered that we were merely expected to arrange this branch of the law in an orderly and systematic form, to relieve it from obscurity and inconsistency, and thus to render its application easier and more definite.

In our endeavor to fulfil the difficult and responsible task thus imposed upon us, we have in many ways been guided by the example of the Commissioners of 1830, and particularly in this: We have avoided making any change in the phraseology of the existing statutes unless some definite and substantive change in the purpose of the law itself was intended, even where some other words or expressions might seem better adapted to express that purpose. Our obvious reason has been that the phraseology of the older statutes, much of which the Commissioners of 1830 copied from prior statutes as early as those of 1705, 1794 and 1797, has acquired through long use and judicial decision a settled and determinate meaning, which should not be disturbed through any desire to attain mere elegance of diction; and, indeed, this course was expressly enjoined upon the Commissioners of 1830 by the Resolution of the General Assembly, which provided that in the revision of the statutes "no such change shall be made in their phraseology by which their true intent and meaning shall in any wise be impaired, altered or affected, except in those instances in which it shall be expressly intended and proposed to amend or change the existing provisions of such statutes." This principle has however been adhered to with greater strictness in revising those statutes which relate to substantive law than in case of those which merely regulate procedure; and, throughout, some verbal changes have been made for the sake of brevity and clearness, where no alteration of the meaning is involved.

Upon another point we would also refer to the judicious language of the Commissioners of 1830, where they stated their belief that the Legislature desired to possess not only a revised

and consolidated code, but one systematized as to subject matter and arranged into regular and appropriate titles each of which shall contain all that naturally belongs to it and no more.

Our duty has been "to codify and revise the law of decedents' estates, whether testate or intestate." As soon, however, as we undertook that duty, we found that it was difficult, if not impossible, to perform it without apparently exceeding the scope of our appointment. We discovered that many statutes applied not merely to the estates of decedents, but in a broader way to other subjects; we could not touch one without touching another, and yet if we omitted such statutes altogether, our work would have been rendered obviously imperfect. For example, the Act of April 18, 1853, P. L. 503, commonly called the Price Act, relates not merely to sales of real estate where the real estate has been acquired by descent or will, but also to cases where the title has been acquired by deed, in which case jurisdiction is vested in the Courts of Common Pleas; and yet by far the greater number of the cases to which the Act applies arise under wills. In this case, we have assumed that our inclusion of such a statute in our work of revision was virtually intended by the Legislature and therefore submit our report with this explanation.

So far as concerns our recommendations for substantive changes in the law, we have endeavored to be conservative, and yet have not hesitated to suggest important changes where we thought them distinctly beneficial. It has been often said, and with truth, that the burden of proof is upon him who advocates a change in the law, and this rule is distinctly applicable to that department of the law which has been referred to us. For the law of decedents' estates in this Commonwealth is and has been for many years, certainly since the Revised Acts drafted by the Commissioners of 1830, most admirable in its theory, and in practice most satisfactory to the community. We have therefore been careful to limit our recommendations to those changes, which we felt after our careful deliberations and unanimous conclusions would meet with the approval of the representatives of our fellow citizens, and deserve a practical trial. We have further endeavored to obtain from those best qualified to make suggestions their aid and counsel, and to this end immediately on our appointment addressed the Judges of the Supreme, Superior, Common Pleas and Orphans' Courts of the Commonwealth, and caused an advertisement of our appointment to be inserted in our principal

legal journals as notice to the Bar. All the suggestions that we have received in this way have been carefully considered and many of them have been adopted by us.

It gives us pleasure also to acknowledge our indebtedness to the Legislative Reference Bureau for much valuable assistance.

In thus laying before the General Assembly the accompanying drafts, we would express our fear lest the complexity and difficulty of our subject may have caused us to omit matters that should have been included. But we hope that such are not numerous or, comparatively speaking, important, and that the work as a whole may meet with the approval of the General Assembly and prove beneficial to the Commonwealth.

JOHN MARSHALL GEST,
GEORGE E. ALTER,
THOMAS J. BALDRIGE,
Commissioners.

SAMUEL D. MATLACK,
Law Clerk and Secretary.

FEBRUARY 1, 1917.

THE ORPHANS' COURT PARTITION ACT

of

June 7, 1917 (P. L. 337)

Preliminary Note by Commission

None of the subjects considered by the Commissioners have needed revision more than that of partition. The Acts of Assembly relating to this are numerous and complicated, and the Commissioners have experienced no little difficulty in their revision.

In Sections 2 and 3 of the Act as reported, express provision is made for a citation and notice to the parties interested before an inquest is awarded.

In Section 5, and in other sections of the act, more liberal provision is made for the service of citations or notices to parties resident outside of the commonwealth.

In Section 6, it is provided that the sheriff's inquisition shall consist of three men, corresponding with the number of commissioners.

In Section 7, the fees of commissioners and jurors are regulated.

In Section 13, it is provided that the allotment of purparts among the parties entitled shall be in accordance with seniority of age, in order to establish a uniform method in all cases.

In Section 43, an appeal is authorized from the decree of the court awarding an inquest, which under the present law is held to be interlocutory only.

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1. TITLE.

AN ACT

Relating to the jurisdiction, powers and procedure of the several orphans' courts in proceedings for the partition and valuation of real estate, and for the sale of real estate for the purpose of distribution, and the fees, costs and expenses therein.

2. JURISDICTION OF ORPHANS' COURT.—In general.

SECTION I. (a) Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General assembly met, and it is hereby enacted by the authority of the same, that the orphans' court of each county of this Commonwealth shall have jurisdiction, but not exclusive jurisdiction,¹ in the partition and valuation of real estate, within the county, of

NOTE.—This is a new section combining the provisions of the various acts relating to the jurisdiction of the Orphans' Court in partition. The derivation of the different clauses is shown in the special notes below.

Special Notes to Section 1.

¹Derived from Section 1 of the Act of April 21, 1846, P. L. 426, 3 Purd. 3451, which provides that the jurisdiction in cases of intestacy shall not be exclusive, and the proviso to Section 4 of the Act of April 13, 1840, P. L. 320, 3 Purd. 3424, which makes similar provision as to cases of testacy.

It seems unnecessary to reenact the provision of those acts that nothing therein contained shall be construed to prevent any of the parties interested in the real estate from proceeding by action in partition (or bill in equity) as theretofore.

any decedent, testate² or intestate,³ whether such decedent was at the time of his death seized or possessed of such real estate solely or as tenant in common or joint owner with any other person or persons,⁴ and whether or not the surviving spouse of such decedent shall elect to take against his or her will,⁵ and notwithstanding there may be a limitation of an estate or interest in the premises or some part thereof, to a person or persons not in existence;⁶ and several undivided interests in any premises, derived from different ancestors by descent or devise, may be parted or valued in one proceeding in said court.⁷ *Provided, That* such

²This covers the provisions of Section 4 of the Act of April 13, 1840, P. L. 320, 3 Purd. 3424; Section 1 of the Act of May 9, 1889, P. L. 146, 3 Purd. 3424; and Section 10 of the Act of April 10, 1849, P. L. 596, 3 Purd. 3424, so far as they confer jurisdiction in cases of testacy.

The Act of 1840 gave jurisdiction where the parties interested or any of them were minors or the course of descent was not altered by the provisions of the will. The Act of 1889 gave jurisdiction in all cases of testacy, without respect to the minority of the parties or their relationship to the testator. The Act of 1849 gave jurisdiction where the whole or part of the real estate was devised to two or more children.

³This embodies the jurisdictional provision of Section 36 of the Act of March 29, 1832, P. L. 201, 3 Purd. 3418. This was Section 38 in the draft of the Commissioners of 1830, and was founded upon Section 22 of the Act of April 19, 1794, 3 Sm. L. 143, with various changes.

The Commissioners remarked that in this and the ten succeeding sections they had collected all the provisions relating to partition in the orphans' court which were scattered in various acts, and had endeavored to consolidate and arrange them in order.

⁴This covers the first part of Section 1 of the Act of March 13, 1847, P. L. 319, 3 Purd. 3424.

⁵This covers the jurisdictional provision of Section 2 of the Act of April 20, 1869, P. L. 77, 3 Purd. 3423, and that part of Section 1 of the Act of May 9, 1889, P. L. 146, 3 Purd. 3424, which provides that the orphans' court shall have jurisdiction in all cases of testacy, without respect to "the fact of a widow's election not to take under the will."

⁶These words have been added to make it clear that the orphans' court has jurisdiction in such cases. Section 1 of the Act of June 3, 1840, P. L. 593, and Section 9 of the Act of April 5, 1842, P. L. 234, 3 Purd. 3412-13, refer only to "writs of partition." The second proviso of the Act of 1840 is covered by Section 40 of this draft. (See 60, *infra*.) The first proviso, as amended by the Act of 1842, is embodied in Section 2, *infra*. (See 4, *infra*.)

⁷This incorporates the provision of Section 1 of the Act of February 26, 1869, P. L. 4, 3 Purd. 3425, which was passed because of the decision in Snyder's Appeal, 36 Pa. 166, that the estate of one decedent only could be partitioned in a proceeding in the orphans' court, which had no jurisdiction where the tract was held in common by the same parties, partly as devisees of their father and partly as heirs of their mother.

court shall not have such jurisdiction during the continuance of any life estate in the whole of such real estate.⁸

⁸The proviso is new, being declaratory of the existing law: *Lee's Estate*, 13 Phila. 291.

Where the decedent had, during his lifetime, sold and conveyed certain real estate of which he was the owner in fee, without the joinder of his wife, the court dismissed the widow's petition for the partition thereof after his death, stating, with regard to the purview and scope of the act "The very words of the enactment show that it applies only to the real estate of which the decedent died seized, and excludes from its purview and operation lands of which the decedent did not die seized. The language of the act is so clear that even a layman can understand the same and no canons of construction need be introduced to interpret its purposes or enactments." Per Hughes, P. J., in *Stockdale's Estate*, 29 Dist. 1013. (Note. This case contains a very extensive discussion of the previous statutes relating to partition in the orphans' court out of which the Act of 1917 was constructed.)

"The Act of March 13, 1847, P. L. 319, declares 'The jurisprudence of the several orphans' courts of this Commonwealth, in the partition and valuation of real estate, shall extend to any undivided interest, in fee simple, in any lands or tenements of which any person has died or shall hereafter die seized or possessed, as tenant in common or joint owner, with any other person or persons, as fully as if such decedent were solely seized or possessed thereof at the time of his or her death.' This is reenacted in Section 1 of the Act of June 7, 1917, P. L. 337. 'The jurisdiction of the common pleas being concurrent with that of the orphans' court in partition proceedings, what is necessary in the one is requisite in the other. In partition, whether in the common pleas or in the orphans' court, it is incumbent on the party instituting the proceeding, if practicable to embrace the whole of the undivided realty within the jurisdiction or power of the court. There cannot be inquisitions upon it by parcels': *Stickles vs. Oviatt*, 212 Pa. 219. It was clearly practicable to include all of the real estate of the common ancestor in one bill in the court below, and it correctly so held." Opinion of the court in *Gilpin vs. Brown*, 268 Pa. 398; 112 Atl. 124.

3. COAL AND TIMBER LANDS.

(b) Partition may be made under this act of lands and coal-rights therein, and of lands and timber-rights thereon, of any decedent, whether the rights of all the parties be co-extensive with the whole or not; and whether the rights of some of them extend only to the lands and part of the coal therein, or only to the land and part of the timber thereon, or only to an undivided interest in the land, or in the coal therein or in the timber thereon; and any person having an interest as herein set forth may compel

partition of the entire tract of land and coal, or land and timber, provided said coal or said timber has not been entirely severed so as to constitute a separate estate.

NOTE.—This is Section 1 of the Act of May 6, 1915, P. L. 269, 6 Purd. 7052, amending Section 3 of the Act of May 14, 1874, P. L. 156, 3 Purd. 3449. In the first line, "this act" has been substituted for "existing laws."

The repeal of the acts mentioned is recommended only so far as they relate to the orphans' court.

4. PETITIONERS.

SECTION 2. The jurisdiction of the orphans' court under this act shall be exercised on the petition of the surviving spouse of the decedent, of any heir of the decedent in a case of intestacy, or of any devisee having an interest in the real estate in question in a case of testacy, whether the interest of such person be vested in possession or in remainder, or of any person having a life interest in an undivided share of such real estate, or of any alienee or devisee of any party in interest. If the party be a weak-minded person for whom a guardian has been appointed, or a minor, lunatic or habitual drunkard, the petition shall be filed by the guardian or committee of such party.

NOTE.—This is founded on part of Section 36 of the Act of March 29, 1832, P. L. 201, 3 Purd. 3418. That section relates only to cases of intestacy and provides for application by the widow or any lineal descendant. It is now extended to include a surviving husband and collateral heirs, parties entitled in remainder, and alienees or devisees of parties in interest. Provision is also made for the cases of lunatics, etc., as well as minors. This covers the provisions of Section 1 of the Act of March 22, 1865, P. L. 31, 3 Purd. 3450, so far as they relate to partition in the orphans' court. The provision as to life tenants of undivided shares corresponds to the Acts of 1840 and 1842, referred to in Note 6 to Section 1 (a) *supra*. (See 2 *supra*.)

Section 46 of the Act of March 29, 1832 (P. L. 202), 3 Purd. 3432 reads: "When the decedent leaves no lineal descendants, the like proceedings shall be had in all respects, on the application of the persons in whom the estate shall vest in possession." This is covered by the present section of the new draft. Under Section 46 it was held that jurisdiction was conferred only when the application was made by those in whom the estate vested in possession, and a collateral heir, entitled in remainder only, had no standing: *Negley's Estate*, 23 Pitts. L. J. 41; *Deshong's Estate*, 6 Del. Co. 519. Under the revised Intestate Act, collateral heirs will not take if there are any lineal descendants, and when collateral heirs do take their interests will vest at once, since the life estates of surviving spouses and of parents are abolished.

Section 1 of the Act of June 26, 1895, P. L. 381, amended by the Act of June 10, 1901, P. L. 553, 3 Purd. 3450, and Section 2 of the Act of June 26, 1895 (P. L. 381), 3 Purd. 3451, provide for the appointment of a committee *ad litem* for lunatic defendants "in all actions or proceedings in partition, and in all other actions and proceedings whatsoever, either at law, in equity or in the orphans' court." It seems unnecessary to repeat these provisions in the Partition Act.

Section 8 of the Act of April 24, 1843, P. L. 360, 3 Purd. 3434, providing a method for securing, before partition, the widow's dower interest in property which was owned by the decedent in common or coparcenary with others, is recommended for repeal as unnecessary, in view of the provisions of Sections 2 and 12 (see 16 *infra*) of this draft.

The local Act of February 13, 1867, P. L. 160, 3 Purd. 3435, provides that in all cases of testacy, on the petition of the widow or of her personal representative, the court shall have power to appoint commissioners or award an inquest for the purpose of making partition or valuation of the dower of the widow. This act relates to York and Fayette Counties.

See form 56.

One having at least a life estate, if not a fee, under a will disposing of an undivided fourth interest in certain real estate, is a proper party to petition the court for partition under this section of the act. Klump's Estate, 50 Pa. C. C. 99, 29 Dist. 1004.

A petition for an inquest in partition under this section of the act will be dismissed where the guardian of the estate of minor heirs or devisees has not been joined. A petition by a remaining trustee for a citation directed against the parties in interest, to show cause why an inquest in partition should not be granted, whereunder a citation was awarded directed against two children who were of age and against no one else, which children in their answer aver that a guardian appointed for three other children who were minors had not been made a party to the proceedings, was dismissed. Herdle's Estate, 29 Dist. 817.

5. CITATION.

SECTION 3. On such petition, supported by oath or affirmation, the court may award a citation, returnable at a day certain, not less than ten days after the issuing thereof, directed to all the parties in interest other than the petitioner or petitioners, to show cause why an inquest in partition should not be awarded. Such citation shall be served in the manner provided by law for the service of other citations in the orphans' court.

NOTE.—This is a new section, modeled on Clause 1 of Section 57 of the Act of March 29, 1832 (P. L. 190) 3 Purd. 3373. It seems unnecessary to repeat in this act the provisions as to service, publication, etc., contained in the Orphans' Court Act.

6. PARTIES RESPONDENT; NOTICE TO UNKNOWN PARTIES.

SECTION 4. All parties in interest, including those entitled in remainder, shall be named in the petition, citation, decree and notices, when known; but if it shall appear, on oath or affirmation, that the names or residences of any of the parties are unknown to the petitioner for the partition, the orphans' court shall have the power to direct such notices as shall appear to the court to be reasonable and proper to be given to such parties by publication, describing the parties, as far as practicable; and the proceedings shall be as effectual, to all intents and purposes, as if all the parties had been named in the proceedings.

NOTE.—This is Section 2 of the Act of April 14, 1835, P. L. 275, 3 Purd. 3425, extended to cases of testacy as well as intestacy.

The following words have been inserted: "including those entitled in remainder," and "citation," and the words "in the public newspapers" have been omitted.

7. SERVICE OUTSIDE OF STATE.

SECTION 5. Where any of the parties in interest reside outside of the commonwealth of Pennsylvania and their places of residence are known, the court may, in its discretion, authorize any citations or notices provided for by this act, to be served upon them personally or by registered mail, or direct publication thereof.

NOTE.—This is a new section. Where the residence of a party is known and he can be personally served, constructive notice by publication is not only unnecessarily expensive but futile. The proceeding being one *in rem*, there can be no objection to service outside of the state which would not apply equally to service by publication.

8. APPOINTMENT OF COMMISSIONERS, OR AWARD OF INQUEST.

SECTION 6. If, on the return of such citation, no answer or an insufficient answer be filed, or if, after hearing on petition, answer, replication and proofs, it shall appear proper, the court may appoint, on the agreement and nomination of the parties, three or more commissioners to divide or value the real estate described in the petition, with the same effect as a sheriff's inquest for the same purpose, or, if the parties cannot so agree, may

award an inquest to make partition among the parties in accordance with their respective interests, the inquest to consist of three men.

NOTE.—The first three lines, to the word “proper,” are new. The provision as to awarding an inquest is taken from Section 36 of the Act of March 29, 1832, P. L. 201, 3 Purd. 3418, except that the words “among the parties in accordance with their respective interests” have been inserted, to cover cases where the interests are unequal, as was done by Section 10 of the Act of April 10, 1849, P. L. 596, 3 Purd. 3424, which related only to devises to two or more children, and is now recommended for repeal.

The provision of Section 36 of the Act of 1832 for the appointment of “seven or more disinterested persons” has been omitted, and the provision of Section 4 of the Act of April 27, 1855, P. L. 369, 3 Purd. 3452, substituted.

The Act of May 1, 1879, P. L. 40, 3 Purd. 3452, reduced the number of jurors from twelve to six. The number is now reduced to three.

The Acts of 1855 and 1879 apply to proceedings in the common pleas as well as in the orphans’ court and are recommended for repeal only so far as they relate to the latter court.

9. COMPENSATION AND MILEAGE OF COMMISSIONERS AND JURORS.

SECTION 7. The compensation of such commissioners, and of the jurors when an inquest is awarded, shall be fixed by the court, but shall not exceed five dollars a day each, for each day engaged in making such partition and valuation, unless the parties interested shall agree in writing to a larger compensation. Such commissioners and jurors shall also receive in addition to their daily pay three cents per mile circular for each mile necessarily traveled by them, counting from the place at which said commissioners or jurors first met.

NOTE.—Section 4 of the Act of April 27, 1855, P. L. 369, 3 Purd. 3452, allowed the commissioners three dollars a day and did not provide for mileage. Section 2 of the Act of April 17, 1856, P. L. 386, 3 Purd. 3455, allowed the jurors one dollar per day and mileage.

The Commissioners consider that it is proper to fix the same maximum compensation and to allow mileage in both cases. The increase to five dollars a day is justified in cases involving the services of men experienced in the valuation of real estate. The amount of the compensation is left to the discretion of the court in every case.

**10. MAKING OF PARTITION BY COMMISSIONERS,
OR INQUEST.**

SECTION 8. The commissioners or inquest shall, if the same can be done without prejudice to or spoiling the whole, make partition of the real estate in purparts among the parties entitled in accordance with their respective interests, whether such interests be equal or otherwise, and shall make return thereof to the court.

NOTE.—This is a new section, declaratory of the existing law and introduced for the sake of completeness.

The provision for cases where the interests of the parties are not equal is suggested by the second clause of Section 10 of the Act of April 10, 1849, P. L. 596, 3 Purd. 3424, which relates only to devises to two or more children in unequal proportions. The first clause of that section is covered by Section 1 (see 2 *supra*) of the present draft, and the last clause is a validating provision. The section is recommended for repeal.

**11. ACTION OF COMMISSIONERS OR INQUEST,
WHERE EQUAL PARTITION CANNOT BE
MADE; WHERE NO DIVISION IS POSSIBLE;
VALUATION OF THE WHOLE.**

SECTION 9. (a) When any such estate cannot be divided among the parties entitled thereto without prejudice to or spoiling the whole, the said commissioners, or the said inquest, as the case may be, shall make and return a just appraisement thereof to the court.

NOTE.—This is the first part of Section 37 of the Act of March 29, 1832, P. L. 201, 3 Purd. 3427, which was derived from Section 22 of the Act of April 19, 1794, 3 Sm. L. 143.

It is now changed so as to apply in all cases and not merely to cases of intestacy where the real estate descends to the widow and lineal descendants. The word "commissioners" has been substituted in line 3 for "seven or more persons."

The remainder of Section 37 of the Act of 1832 is covered by subsequent sections of this draft.

12. PURPARTS UNEQUAL IN VALUE.

(b) When equal partition in value, or partition in accordance with the respective interests of the parties, cannot be made by the said commissioners or the said inquest, they shall make a just appraisement of the respective purparts or shares into which they may divide the estate; and the court shall award that one

or more of the purparts or shares shall be subject to the payment of such sum or sums of money as shall be necessary to equalize the value of the said purparts, according to the said appraisement thereof; which sum or sums of money shall be paid or secured to be paid, by the several persons accepting such purparts, in the manner prescribed in Section 17 hereof. (See 23-5, *infra*.)

NOTE.—This is Section 38 of the Act of March 29, 1832 (P. L. 190) 3 Purd. 3430, which was new in that act and was intended to provide for the case “where partition *can* conveniently be made, but the value of the shares cannot be equal.” The words from “or” to “parties” in lines 1 and 2 have been added, to conform to Section 8 of this draft. (See 10, *supra*.)

The second clause of the section, relating to the order of allotment of the purparts, is omitted here, being covered by Section 13 (see 17-19, *infra*) of this draft.

13. PURPARTS NOT EQUAL IN NUMBER TO NUMBER OF PARTIES ENTITLED.

(c) When such estate cannot conveniently be divided into shares equal in number to the number of parties entitled, the said commissioners or the said inquest shall make a just appraisement of the respective purparts or shares into which they may divide the estate; and the parties to whom such shares shall be awarded, or some one in their behalf, shall pay or secure to be paid to the other parties interested, their respective parts of the value thereof, in the manner prescribed in Section 17 hereof. See 23-25 *infra*.)

NOTE.—This is Section 39 of the Act of March 29, 1832, P. L. 190, 3 Purd. 3431, which was derived in substance from Section 22 of the Act of April 19, 1794, 3 Sm. L. 143. In line 2, “shares equal in number to the number of” has been substituted for “as many shares as there are,” the intention being to cover cases where the number of purparts exceeds the number of parties, as well as where there are fewer purparts than there are parties entitled.

The portion of the section dealing with the allotment of the purparts is omitted here, being covered by Section 13 (see 17-19, *infra*) of this draft.

14. VALUATION OF UNDIVIDED INTEREST OF DECEDENT.

SECTION 10. Where the decedent shall die seized or possessed, as tenant in common or joint owner, of any undivided interest in

fee-simple in any lands or tenements, the commissioners or inquest shall value and return such interest, undivided, in all cases; and if such decedent had other real estate, such interest shall be valued and returned, either by itself, or in connection with some other portion of such decedent's real estate, as one of the purparts or shares into which they shall divide the whole real estate; and upon the return thereof, the proceedings shall be as in other cases.

NOTE.—This is the last part of Section 1 of the Act of March 13, 1847, P. L. 319, 3 Purd. 3424, the first part of which is covered by Section 1 (see 2 *supra*) of the present draft.

In line 8, "valued" is omitted before "as one of."

Under this section of the act it is incumbent on the party instituting the proceedings, if practicable, to embrace the whole of the undivided realty within the jurisdiction or power of the court. There cannot be inquisitions upon it by parcels. Where a person dies seized in severalty of three tracts of lands, and of undivided interests in two others, it is error to file one bill for the partition of the land held in severalty, and another for that of the undivided interests. *Gilpin v. Brown*, 268 Pa. 398, 112 Atl. 124.

15. RULE TO ACCEPT OR REFUSE THE WHOLE OR PURPARTS AT THE VALUATION.

SECTION 11. In all cases of appraisement or partition mentioned in Sections 8 and 9¹ of this act, the orphans' court shall on application, grant a rule on all persons interested, including those interested in remainder, to come into court, at a certain day to be fixed by the court, to accept or refuse the estate, or a share or portion thereof, as the case may be. A copy of such rule shall be served upon each party personally, ten days before the return thereof, in case such party resides within the county, or if any party shall reside outside the county the court may, in its discretion, authorize service of such rule upon him personally or direct such publication thereof as shall appear to the court to be reasonable and proper.

NOTE.—This is founded on Section 40 of the Act of March 29, 1832 (P. L. 190), 3 Purd. 3431. Provisions as to service of the rule similar to those in Section 4 of this draft have been inserted, and Section 8 of the Act of April 7, 1807, P. L. 155 (4 Sm. L. 398, at p. 401), 3 Purd. 3431, is recommended for repeal.

¹(See 10-13 *supra*.)

In line 4, "including those interested in remainder" has been inserted, thus incorporating the provisions of Section 46 of the Act of 1832, 3 Purd. 3432, on this subject, and making them apply to cases of testacy as well as intestacy. In line 5, "fixed by the court" has been substituted for "by them to be fixed," because the latter words might well be taken to refer to the parties and not to the court.

Section 40 of the Act of 1832 was founded on Section 8 of the Act of 1807, *supra*, the Commissioners remarking that they had made the provisional general, "applying it to all cases of appraisement or partition mentioned in the preceding sections." Section 40, however, applies only to the cases mentioned in the preceding section; the draft was the same. The section is, therefore, confined to the cases mentioned in Section 39 of the Act of 1832, namely, cases where the estate cannot conveniently be divided into as many shares as there are parties interested. It is now made to include cases where partition is made, where no division is possible, and where the purparts are of unequal value.

The provision as to service or publication is made uniform with that in Section 17 (b) (see 24 *infra*) of this draft.

16. BIDS ABOVE VALUATION.

SECTION 12. In all cases of partition of real estate now pending or hereafter to be instituted, in any orphans' court, wherein a valuation shall have been made or shall be made of the whole or parts thereof, the same shall be allotted to such one or more of the parties in interest, whether entitled in possession or in remainder or to an undivided interest for life, and including the surviving spouse of the decedent, who shall, at the return of the rule to accept or refuse to take at the valuation, offer in writing the highest price therefor above the valuation returned; but if no higher offer be made for such real estate or any part thereof, it shall be allotted or ordered to be sold as herein provided.

NOTE.—This is part of Section 1 of the Act of May 8, 1909, P. L. 489, 6 Purd. 7052, except that the words from "whether entitled" to "decedent" have been substituted for "widow."

The section was an amendment of Section 10 of the Act of April 22, 1856, P. L. 532, 3 Purd. 3453, which had previously been amended by the Act of June 1, 1907, P. L. 364. It applies to the common pleas as well, and is to be repealed only so far as it relates to the orphans' court.

17. ALLOTMENT IN THE ABSENCE OF BIDS; ORDER OF CHOICE.

SECTION 13. (a) When no bid above the appraisement of such real estate or any part thereof shall be made as provided in

Section 12¹ of this act, the court may order such real estate or part thereof to and among the parties in interest, including those entitled in remainder, as follows:

First.—To the surviving spouse of the decedent if entitled, under the intestate law or under the will of the decedent, to a share of such real estate or part thereof in fee.

Second.—To the other parties in interest, in the order of their seniority in age.

NOTE.—This clause is new. The inclusion of parties entitled in remainder covers the provision on that subject in Section 46 of the Act of 1832, 3 Purd. 3432. The inclusion of the surviving spouse, entitled in fee, has been inserted to cover cases coming under the operation of the new Intestate Act and cases where the surviving spouse takes an interest in fee under the will of the decedent.

The provision as to seniority in age is substituted for the provisions of Section 37 of the Act of 1832, 3 Purd. 3427, which related only to cases of intestacy, and was derived from Section 22 of the Act of April 19, 1794, 3 Sm. L. 143, and of Section 46 of the Act of 1832, 3 Purd. 3432.

Section 37 of the Act of 1832 applied only to cases where no partition could be made. Section 38, 3 Purd. 3430, provided for allotment of purparts where the value of the purparts was unequal; and Section 39, 3 Purd. 3431, covered the case where the purparts were fewer in number than the parties entitled. The present section of this draft covers all these cases. The other portions of Sections 37, 38 and 39 of the Act of 1832 have been incorporated in Section 9 of this draft. (See 11-13 *supra*.)

Section 37 of the Act of 1832 provided for award to the eldest son or if he was dead to his children, if any, in the order of their birth, and preferring males to females, and in like manner, to his other lineal descendants in the same order, and then to the second and other sons and their descendants, and finally to the daughters and their descendants in the same manner.

Section 46 of the Act of 1832, provides that "when the decedent leaves no lineal descendants, the like proceedings shall be had in all respects, on the application of the persons in whom the estate shall vest in possession." Whether this means that the same order of priority is to be followed as among lineal descendants seems not to have been decided. Section 8 of the Act of April 4, 1797, 3 Sm. L. 296, covered the case of the brothers and sisters.

The Commissioners are of opinion that it is better to adopt the simple rule of seniority of age in all cases, whether the persons entitled are lineal descendants or other relatives of the decedent taking under the Intestate Law, or persons taking under his will, who may or may not be related to him.

¹(See 16 *supra*.)

18. OFFER TO NEXT IN SUCCESSION WHERE PARTY ENTITLED FAILS TO APPEAR OR REFUSES TO TAKE.

(b) In case the party entitled to a choice do not come into court, in person or by guardian or committee, or attorney duly constituted, or in case he shall refuse the same, a record shall be made thereof, and the court may and shall direct the same to be offered to the next in succession, according to the rules provided in clause (a) of this section.

NOTE.—This is taken from the last part of Section 40 of the Act of 1832, 3 Purd. 3431.

19. ELECTION TO TAKE REAL ESTATE, OR SHARE THEREOF, POSTPONES PARTY AS TO OTHER SHARES, OR AS TO REAL ESTATE IN OTHER COUNTY.

(c) In any case where a party has elected to take the real estate of a decedent in one county, or any share thereof, if divided into shares, such party shall not have the right of preference or election to take the real estate or any share thereof in any other county, or any other share in the same county, until all the other parties shall have neglected, after due notice, or refused to take the same at such valuation.

NOTE.—This is Section 45 of the Act of March 29, 1832, P. L. 190, 3 Purd. 3432, with the substitution of "a party" for "one of the heirs of a decedent."

The section was founded on Section 9 of the Act of April 7, 1807, P. L. 155, 4 Sm. L. 398 at p. 401, 3 Purd. 3447, which is recommended for repeal.

20. PERMITTING RESIDUE OF PREMISES TO REMAIN FOR PARTIES NOT APPEARING.

SECTION 14. The orphans' court having jurisdiction in any case of partition shall have power, wherever it shall appear advisable and proper, to cause the share or shares of the party or parties appearing in court to be allotted and assigned to them, and to permit the residue of the premises to remain for the person or persons entitled thereto, and subject to a future partition among them, if more than one person be so entitled.

NOTE.—This is Section 10 of the Act of April 25, 1850, P. L. 571, 3 Purd. 3453. That section applies to the common pleas as well, and is recommended for repeal only so far as relates to the orphans' court.

21. ALLOTMENT TO WIDOW AS HIGHEST BIDDER.

SECTION 15. Where the real estate, or any part thereof, shall be allotted to the widow as the highest bidder, two-thirds of the purchase money thereof, in cases where by existing laws the widow is entitled to a dower of one-third in the real estate, and one-half of the purchase money thereof, in cases where by existing laws the widow is entitled to a dower of one-half in the real estate, shall be paid to those entitled thereto, as provided by law; the remaining one-third or one-half of such purchase money as the case may be, shall be paid to a trustee or trustees to be appointed by the court, which trustee or trustees shall give bond in double the amount to be received; the trustee or trustees as aforesaid, shall pay semi-annually, in lieu of dower, the interest on said one-third or one-half of the purchase money, as the case may be, to the widow during her life, and at her death, the said trustee or trustees shall pay the purchase money to such persons as are entitled by law thereto.

NOTE.—This is the remainder of Section 1 of the Act of May 8, 1909, P. L. 489, 6 Purd. 7052. See note to Section 12 of this draft. (See 16 supra.)

The section as it stands will cover cases of widows of persons dying before the new Intestate Act goes into effect.

“Shall pay semi-annually” has been substituted for “be paid annually.” Semi-annual payments are recommended for the convenience of the widow. The Act of June 1, 1907, P. L. 364, read “pay annually.” The words “be paid annually,” which are obviously incorrect, were introduced in the amendment of 1909, presumably by inadvertence.

The fact that the Orphans' Court Partition Act of 1917, (P. L. 338) in Sections 15, 18 and 29 appears to concede to the widow a lesser estate in lands of the decedent than that conferred by the Intestate Act of 1917 (P. L. 431) approved the same day, does not in any way affect the quantum of the estate taken by the widow under the latter act. If there were any conflict between the two Acts, the Intestate Act must govern as to the interest taken, the Partition Act having to do merely with procedure, and the enforcement of rights conferred by the Intestate Act. But the alleged conflict is only apparent, and the references in the Partition Act to the life estate of the widow are evidently intended to refer to estates of persons dying prior to the Intestate Act of 1917.

“The cited portions of the said Orphans' Court Partition Act of 1917, P. L. 337 (15, 18 and 29) do not and are not designed to, diminish such fee simple share, part or interest so prescribed for the widow in and by the said Wills Act and Intestate Act.

“It is the Intestate Laws of the commonwealth which determine all matters pertaining to the descent and inheritance of estates of decedents,

fixing the character, kind, quantity and amount of the interests or shares in decedents' real and personal property which shall pass to and vest in surviving spouses and kinsmen. The Partition Acts merely provide the method for enforcing the rights so conferred by the Intestate Acts. Hence, it follows that on general principles, were there indeed a clash or conflict between the provisions of the Intestate Act of 1917, P. L. 429 and of the Orphans' Court Partition Act of 1917, P. L. 337, on a matter of quantity, size, amount of shares or interests of a decedent's estate to descend or vest, the latter statute (merely prescribing procedure) would of necessity, yield to the former statute as to matters so lying exclusively within the scope and province of the said Intestate Act.

However, the respondent, in its answer, has not directed our attention to or shown that there really exists any clash or conflict between the two statutes under consideration. By its express terms, the Intestate Act of 1917, P. L. 429 becoming operative and effective on December 31, 1917, is made to apply to estates, real and personal of all persons dying intestate on or after the said day so designated; expressly providing that as to the estates, real and personal, of persons dying before the day designated, the existing laws should remain in full force and effect. Under Section 1 of the Act of April 8, 1833, P. L. 316, which applies to and controls the devolution of estates of intestates dying before December 31, 1917, a surviving widow was entitled to certain interests in her husband's real estate for life only, to wit, so-called statutory dower, i. e. a life estate in a third or a half part of such lands, depending on whether the decedent had left any children or issue. The Intestate Act of 1917, P. L. 429 gives the widow of an intestate dying on or after December 31, 1917, not statutory dower as under the old law, but certain interests in fee simple in the decedent's real estate, to wit, an undivided one-third part thereof or an undivided half part thereof or more, depending on whether or not the decedent leaves children or issue, and if so, the number thereof. The Orphans' Court Partition Act had to be drafted by the law makers to meet the circumstances and requirements of estates of all intestates, to wit, those dying before, as well as those dying after December 31, 1917, for such Act was to apply to estates of decedents entirely irrespective of the dates of their respective deaths. Now, as to widows of intestates dying after December 31, 1917, no special mention of the shares of such widows therein was in such act necessary; for, thereunder surviving spouses taking shares in fee, such shares are of precisely the same character and quality as, and, therefore, fall in the same category with the other shares and interests vesting in the decedent's descendants or collateral kinsmen. The said Act, however, had to make and preserve special provision for the statutory dower of widows of husbands dying prior to December 31, 1917, which circumstance accounts for and explains the use of the pointed out language appearing in Sections 15, 18 and 29 of the said Act. The purpose and necessity for such provisions and language is manifest, to wit, being designed and required to provide for the life interests of widows in estates of intestates dying before December 31, 1917, and in estates of testates dying before said date, where the widows elect to take against the wills of their respective husbands. Accordingly we reach the

conclusion that there exists no clash or conflict between the provisions of the Orphans' Court Partition Act of 1917, P. L. 337 and the Intestate Act of 1917, P. L. 429; at least, as to any matter to which the petitioner has directed our attention. It is well to observe moreover in passing that did indeed such conflict exist between the provisions of the two statutes under consideration, the provisions of the Orphans' Court Partition Act of 1917, P. L. 337, aside from its being a mere possessory action, would, for another important reason, be legally forced to yield to the pertinent provisions of the Intestate Act of 1917, P. L. 429 as to all matters within the scope of the last mentioned statute; for, the latter Act, although approved the same day as the former Act became operative long after the said Orphans' Court Partition Act had become law; so that the Intestate Act thus later becoming operative, would automatically and of necessity supersede such provisions of the Partition Act, if any, in conflict with the provisions of the said Intestate Act." Per Hughes, P. J., in *Dodd's Estate*, 1 Wash. 236.

22. PARTITION TO BE FIRM AND STABLE AFTER FINAL DECREE.

SECTION 16. Upon return made by commissioners appointed by agreement of the parties, or of the inquisition taken, or when the real estate or any purpart thereof is awarded or allotted by the court, and a final decree is entered, the partition thereby made shall be firm and stable forever, subject only to the right of appeal.

NOTE.—This supplies the last part of Section 36 of the Act of 1832, 3 Purd. 3418, which provides that on return by the commissioners or inquisition the court shall have power to give judgment that the partition thereby made be firm and stable forever. The provision of that section as to costs is covered by Section 35 of this draft (see 45-6 *infra*).

23. OWELTY; PAYMENT OR SECURITY.

SECTION 17. (a) In every case provided for in Section 12 or Section 13 of this act¹, the party bidding in or accepting the real estate, or some one on his behalf, shall pay to the other parties interested their proportional parts of the value of such estate, according to the amount of the bid, or the just appraisement thereof, made in manner aforesaid, as the case may be, or shall give good security by recognizance, or otherwise, to the satisfaction of the court, for the payment thereof, with legal interest, at such time or times as in the judgment of the court shall be to

¹See 16-19, *supra*.

the advantage of those entitled to the estate; and the persons to whom or for whose use payment or satisfaction shall be so made, in any of the cases aforesaid, for the respective parts or shares of such real estate, shall be forever barred of all right or title to the same.

NOTE.—This is the last part of Section 37 of the Act of March 29, 1832, P. L. 201, 3 Purd. 3428, extended to all cases covered by Sections 12 and 13 of this draft (see 16-19, *supra*) instead of those cases only which are covered by Section 13. The provision of Section 1 of the Act of May 8, 1876, P. L. 140, 3 Purd. 3432, has been substituted for the words “in some reasonable time,” not exceeding twelve months, as the court may direct,” after the words “with legal interest.” Section 1 of the Act of 1876 is recommended for repeal.

Where the bidder is ready and willing to make payment to the parties in interest in full as soon as the necessary searches against the title can be procured, exceptions relating to making payment on account or the entry of security will be dismissed with leave to apply to the court for a further order if payment in full is not made within sixty days. *Battersby's Estate*, 29 Dist. 221.

24. ENFORCEMENT OF PAYMENT BY NON-RESIDENT.

(b) Where the court shall decree any share or shares to any person not residing within this commonwealth, with the payment of owelty annexed, it shall be lawful for the court, upon application made by any party lawfully interested in the same, to order a rule upon such party, his or her legal heirs or representatives, requiring the payment of said owelty, at such time and upon such terms and conditions as the court shall direct. If the said rule cannot be served within this commonwealth, the court may, in its discretion, authorize service of such rule upon him or them personally or direct such publication thereof as shall appear to the court to be reasonable and proper. Upon return and proof of service or publication as aforesaid, and upon refusal or neglect to comply with the said rule, the court may enforce the same by ordering a sale of such share or shares, for the purposes aforesaid, as in other cases of sales under this act.

NOTE.—This is Section 1 of the Act of April 6, 1844, P. L. 214, 3 Purd. 3432. The provision as to service by publication in the Act of 1844 is by reference to Section 1 of the Act of March 26, 1808, P. L. 144, 4 Sm. L. 518, 3 Purd. 3408, which relates to actions of partition and provides for publication in one daily newspaper of the City of Philadelphia as well as in a newspaper in the county where the land lies. The reference at the end of Section 1 of the Act of 1844 is to the Act of March 29, 1832.

Provisions for service outside of the state, similar to those in Section 5 (see 7 *supra*) of this draft, and for publication, as in Section 11 (see 15 *supra*) have been added.

25. APPOINTMENT OF TRUSTEE FOR PARTIES WHO ARE UNKNOWN, OR CANNOT BE FOUND.

(c) Wherever it shall appear that any party or parties, in whose favor a lien exists until payment be made to them of their respective shares of the money due from the party or parties to whom the real estate or any purpart thereof is awarded at the appraisement or at a price bid therefor above the appraisement, is or are unknown or cannot be found, the court shall have power to appoint a trustee to whom the shares of money due said unknown or other party may be paid, with power in said trustee, upon payment to him of said money, to satisfy said lien upon the proper records, whereupon the said land shall be freed and discharged from said lien. Such trustee shall first file a bond, to be approved by the court, conditioned for the faithful application of the money to him so paid, as aforesaid, according to the trust and order of court. It shall be the duty of the trustee to invest the said moneys in securities authorized by law.

NOTE.—This is Section 1 of the Act of April 3, 1903, P. L. 151, 3 Purd. 3454, except that the second proviso has been added.

Section 2 of the Act of 1903 is a general repealer. The Act of 1903 applies also to proceedings in the common pleas and is recommended for repeal only so far as relates to the orphans' court.

26. WIDOW'S INTEREST; TO REMAIN CHARGED ON THE PREMISES.

SECTION 18. (a) Should the widow of the decedent be living at the time of the partition and entitled to a life estate in one-half or one-third of the real estate under the intestate laws, or should such widow elect to take against the will of the decedent and thereby be entitled to such life estate, she shall not be entitled to payment of the sum at which her purpart or share of the estate shall be valued, but the same, together with interest thereof, shall be and remain charged upon the premises, if the whole be taken by one person, or upon the respective shares, if divided as hereinbefore mentioned, and the legal interest thereof shall be semi-annually and regularly paid by the persons to whom such real estate shall be adjudged, their heirs or assigns, holding the same, according to their respective portions, to the said widow,

during her natural life, in lieu and full satisfaction of her dower at common law, and the same may be recovered by the widow by distress or otherwise, as rents in this commonwealth are recoverable. On the death of the widow, the said principal sum shall be paid by the persons to whom the said real estate shall have been adjudged, their heirs or assigns, holding the premises, to the persons thereunto legally entitled.

NOTE.—This is Section 41 of the Act of March 29, 1832, P. L. 202, 3 Purd. 3433, with the insertion of language to make it apply only to cases of decedents dying before the new Intestate Act goes into operation, and the substitution of "persons" for "child or other descendant."

The section was derived from Section 22 of the Act of April 19, 1794, 3 Sm. L. 143, and Section 6 of the Act of April 7, 1807, P. L. 155, 4 Sm. L. 398 at p. 400. The latter section is printed in the Digests, but since it seems to have been supplied by the Act of 1832, its express repeal is now recommended.

The fact that the Orphans' Court Partition Act of 1917 (P. L. 338) in Sections 15, 18 and 29 appears to concede to the widow a lesser estate in lands of the decedent than that conferred by the Intestate Act of 1917 (P. L. 429) approved the same day, does not in any way affect the quantum of the estate taken by the widow under the latter act. If there were any conflict between the two Acts, the Intestate Act must govern as to the interest taken, the Partition Act having to do merely with procedure and the enforcement of rights conferred by the Intestate Act. But the alleged conflict is only apparent, and the references in the Partition Act to the life estate of the widow are evidently intended to refer to estates of persons dying prior to the Intestate Act of 1917.

Dodd's Estate, 1 Wash. 236. (See extract from opinion under Section 21, *supra*.)

27. CHARGING WIDOW'S INTEREST ON PARTICULAR PURPARTS.

(b) When the real estate of any decedent shall consist of several different tracts or pieces of land, and the same shall be adjudged to any of the parties entitled thereto, or ordered to be sold, by any orphans' court, such court shall have authority to decree that the share or purpart of the widow of such decedent in the whole of said real estate, where such widow is entitled to a life interest, together with the interest thereof, shall be and remain charged on one or more of the said tracts or pieces of land, in the manner and for the purposes now provided by law, and that the remaining tracts or pieces of land shall be wholly discharged from the share or purpart of such widow, or any part thereof: *Provided*, That the pieces or tracts of land, upon

which such purpart or share shall be so charged as aforesaid, shall, in the opinion of such court, be fully sufficient to secure the payment of the principal and interest of such purpart or share: *And provided further*, That such widow shall have the same remedies for recovery of her interest as are provided in clause (a) of this section.

NOTE.—This is Section 1 of the Act of January 7, 1867, P. L. 1367, 3 Purd. 3435, with the insertion of the words, “where such widow is entitled to a life interest,” to show that the section will apply only to cases where the decedent has died or shall die before the new Intestate Act goes into effect.

28. OTHER UNDIVIDED INTERESTS TO REMAIN CHARGED ON REAL ESTATE.

SECTION 19. Should any person other than the widow of the decedent be entitled, under the intestate laws, or should any person, including the widow of the decedent, be entitled under the will of the decedent, to a life interest in an undivided share of the real estate, the share of such tenant for life shall not be paid to him or her, but the same, together with interest thereof, shall be and remain charged upon the premises, if the whole be taken by one person, or upon the respective shares, if divided as hereinbefore mentioned, and the legal interest thereof shall be semi-annually and regularly paid by the persons to whom such real estate shall be adjudged, their heirs or assigns, holding the same, according to their respective portions, to the said tenant for life, during his or her natural life, and the same may be recovered by such life tenant as debts of like nature in this commonwealth are recoverable. On the death of the life tenant, the said principal sum shall be paid by the persons to whom the said real estate shall have been adjudged, their heirs or assigns, holding the premises, to the persons thereunto legally entitled.

NOTE.—This is a new section, making provisions for other undivided life interests similar to those made by Section 18 (a) (see 26 *supra*) for widows, except that the remedy for collection is made the same as the remedy for recovery of “debts of like nature.”

29. DEDUCTION OF RENTAL VALUE FROM SHARES OF PARTIES WHO HAVE BEEN IN POSSESSION.

SECTION 20. In case of partition of real estate now or hereafter held by two or more persons as tenants in common, where one or more of said tenants shall have been or shall hereafter be

in possession of said real estate, the parties in possession shall have deducted from their distributive shares of said real estate the proportional part of the rental value thereof to which their co-tenant or co-tenants are entitled for the time such real estate shall have been in possession as aforesaid.

NOTE.—This incorporates so much of Section 1 of the Act of June 24, 1895, P. L. 237, 3 Purd. 3454, as relates to partition. The other part of the section gives a remedy for such rentals by action between co-tenants. The section is recommended for repeal only so far as relates to the orphans' court.

Exceptions filed to a decree because it made no provision for the ascertainment of rental values of the premises allotted and the mesne profits of the business there conducted during the occupancy of the premises by one of the parties in interest were dismissed where there were no facts before the court upon which to base an appropriate finding and where, from facts assumed from argument of counsel there would seem to be no reason why the parties in interest should not be able to reach an amicable adjustment; with leave to apply by petition for necessary relief if later required. Battersby's Estate, 29 Dist. 221.

36. RULE TO SHOW CAUSE WHY SALE SHOULD NOT BE MADE; DECREE OF SALE.

SECTION 21. Upon an appraisalment or valuation of real estate made as provided in Section 9 or Section 10 of this act, should all the parties neglect, after due notice, as provided in Section 11 hereof, or refuse to take the same or any part thereof at the valuation, or to bid above the appraisalment as provided in Section 12¹ hereof, the court shall, on the application of any one of the parties, grant a rule upon the other parties interested, to show cause why the estate, or part thereof, so appraised and not taken at the appraisalment or bid for, should not be sold; which rule shall be returnable at such time as the court, having respect to the circumstances of the case, may direct; and service of such rule shall be made in the manner provided by law for the service of citations in the orphans' court. On the return of such rule, the court may, on due proof of notice to all persons interested, make a decree authorizing and requiring the executor or administrator, as the case may be, to expose such real estate, or part thereof, to public sale, at such time and place, and on such terms as the court may decree: *Provided*, That the rule to show cause herein directed may be dispensed with by the court, on the

¹(See 11-16 *supra*.)

application of all the parties in interest, if of full age and sui juris, and of the guardians or committees of such as are weak-minded persons for whom guardians have been appointed, minors, lunatics or habitual drunkards, for such decree; and public notice of such sale shall be given by the person who is to make the sale, once a week for a period of three weeks before the day appointed therefor, by advertisement in at least one newspaper published in the county, if there be one, or, if there be none, then in an adjoining county; and in all cases, notice shall also be given by handbills, one of which shall be posted at a conspicuous place on the real estate proposed to be sold, and at least three of which shall be posted at three of the most public places in the vicinity of such estate; and in any case the court may, by general rule or special order, require such further notice as it shall deem advisable.

NOTE.—This is Section 42 of the Act of March 29, 1832, 3 Purd. 3438, which was founded on Section 1 of the Act of April 2, 1804, P. L. 459, 4 Sm. L. 183-4, and Section 2 of the Act of March 26, 1808, P. L. 144, 4 Sm. L. 518-9, the provision for making the rule returnable later than the next regular session of the court being new in the Act of 1832.

The changes now suggested are to modify the language so as to include cases where there is a division into fewer purparts than parties entitled (now covered by Section 7 of the Act of April 7, 1807, P. L. 155, 4 Sm. L. 398 at p. 400, 3 Purd. 3440), and cases of failure or refusal to take some purparts (now covered by Section 1 of the Act of April 15, 1845, P. L. 458, 3 Purd. 3440); to substitute "parties" for "heirs," in line 3 and other places; to insert the provisions as to lunatics, etc.; to substitute a new provision as to service of the rule; and to add, at the end, provisions for notice of sale similar to those in Section 16 (*g*) (see 438 *infra*) of the Fiduciaries Act.

The Act of June 12, 1893, P. L. 461, 3 Purd. 3447, and the amendment of May 23, 1913, P. L. 304, 6 Purd. 7051, relating to sales of real estate for the purpose of distribution on petition of all parties in interest, are covered by Section 23 (see 32-3 *infra*) of the present draft.

31. COMBINATION OF RULE TO ACCEPT OR REFUSE WITH RULE TO SHOW CAUSE WHY SALE SHOULD NOT BE MADE.

SECTION 22. In all cases of the partition or valuation of real estate, the orphans' court may, upon the application of any party in interest, instead of the separate rules herein provided for such cases, grant a rule upon the parties interested to appear, and accept or refuse the said real estate at the valuation, or, in case they or any of them should neglect or refuse to take and

accept the same as aforesaid, show cause why the said real estate, or any part thereof, should not be sold.

NOTE.—This is Section 2 of the Act of April 25, 1850, P. L. 569, 3 Purd. 3440, except that "any party in interest" is substituted for "any of the heirs of the decedent" after "the application of the widow," and "herein provided for" is substituted for "heretofore issued in," after "separate rules."

32. SALES FOR THE PURPOSE OF DISTRIBUTION, ON PETITION OF ALL PARTIES' INTEREST; IN GENERAL.

SECTION 23. (a) Whenever any person shall die seized of real estate, and the parties in interest desire the same to be converted into money for distribution, it shall be lawful for the orphans' court of the proper county, in its discretion, upon the joint petition of the widow and heirs, or devisees, and the guardians or committees of such as are minors or under disability, in whom the real estate of the decedent shall have vested by descent or will, and legatees whose legacies are charged on said real estate, or the representatives of such as may be deceased or under disability, to order the executor or administrator, or a trustee to be appointed by said court, to make sale of said real estate. Such petition shall set forth the description of the property, the desire to have the same sold, and its estimated value according to the affidavits of two disinterested and competent persons, and said petition shall be duly sworn to. Said order shall provide that, before making sale, the executor, administrator or trustee shall give bond, in double the estimated value of the said real estate, and shall proceed thereafter in all respects in the manner provided by this act in cases of the sale of real estate under proceedings in partition. The proceeds of such sale, after payment of the expenses thereof, shall be distributed to and among those entitled thereto, the same as real estate. Such sale shall have the same effect in all respects as a public sale in proceedings in partition of real estate under this act.

NOTE.—This is Section 1 of the Act of June 12, 1893, P. L. 461, 3 Purd. 3447, as amended by the Act of May 23, 1913, P. L. 304, 6 Purd. 7051, with further changes.

The Act of May 14, 1874, P. L. 166, 1 Purd. 1120, relating to real estate valued at not more than one thousand dollars, is supplied by the Act of 1893 and should be repealed. The Act of 1874, however, has been followed in the new draft as to the provision that the petition shall set

forth the estimated value of the property, and that this estimate shall be supported by the affidavits of disinterested persons.

The Act of 1874 provided that the proceedings should be the same as those in cases of sales for payment of debts. The Commissioners consider that the reference to proceedings in partition is more appropriate.

In the new draft, the words "or devisees" have been inserted in line 6; the words "or under disability" have been inserted in line 11; the words "to be appointed by said court" have been inserted after "trustee" in line 12; and "estimated" has been substituted for "appraised" in line 19. The order of the clauses has also been altered for the sake of clearness.

Where an intestate left him surviving no widow, and five minor children as his sole heirs at law, they having but one guardian, a petition by said minors, through such guardian, is their joint petition within the meaning of the act. *Fogelsanger's Estate*, 267 Pa. 321, 110 Atl. 172.

33. LANDS IN DIFFERENT COUNTIES.

(b) When the lands, in respect to which a petition for sale shall be filed under the provisions of clause (a) of this section, shall lie in one or more adjoining tracts in different counties, or shall lie in two or more counties, but not in adjoining tracts, the proceedings shall be in the courts designated in Sections 37 and 38¹ of this act, respectively.

NOTE.—This clause is new.

¹(See 50-56 *infra*.)

34. APPOINTMENT OF TRUSTEE TO MAKE SALE.

SECTION 24. Whenever any real estate shall be ordered to be sold under proceedings in partition, the orphans' court is hereby authorized and required, in case of the neglect or refusal of the executor or administrator to execute such order, or in case there be no executor or administrator, or in case the court for any reason deems it advisable, to appoint some suitable person trustee for the purpose of making such sale, who shall be subject to the same restrictions, and have the same powers, and whose proceedings shall have the same effect, to all intents and purposes, as are provided in the case of such sales by executors or administrators.

NOTE.—This is Section 44 of the Act of February 24, 1834, P. L. 81, 3 *Purd.* 3439, which was not included in the draft prepared by the Commissioners of 1830.

The words "or in case the court for any reason deems it advisable" have been inserted in order to confer upon the court a discretion which, it has been held, does not now exist: *Arble's Estate*, 161 Pa. 373.

Under Section 24 of the Orphans' Court Partition Act of June 7,

1917, P. L. 337, which authorizes the court, if for any reason it deems it advisable, to appoint some suitable person trustee for the purpose of making a sale, the court will appoint an independent trustee for such purpose where the personal interests of the executors are in conflict with the interests of the petitioners to have the sale made promptly and bad feeling exists between them.

Semble. The court may also make such appointment where the executors have discharged their active duties and are *functi officii*.

"Under the will of Ann Whitaker, who died in 1890, a large part of her real estate remaining undivided, this partition proceeding was brought and has been so far pursued that it is now ripe for the appointment of a trustee to conduct the sale.

"Parties representing about one-third interest have petitioned for the appointment of an independent trustee, alleging that reasons exist rendering it advisable to appoint some suitable person other than the surviving executors. The master, in a careful and well-considered report, has found that these reasons exist.

"It might well be argued that the executors are *functi officii* (see Henson's Estate, 12 Dist. R. 326), for the reasons that they qualified over thirty years ago, their active duties have long since ceased and certain shares of the real estate have passed by the wills of the devisees of Ann Whitaker to their devisees, and, in turn, by the wills of the latter to certain of the present parties.

"Upon reviewing the testimony taken before the master, we concur in his findings, are of the opinion that we should exercise the discretion permitted by the act and appoint some disinterested and suitable person to execute the order of sale."

Henderson, J., in Whitaker's Est. 30 Dist. 814, 35 York 99.

35. BOND OF EXECUTOR, ADMINISTRATOR OR TRUSTEE MAKING SALE.

SECTION 25. In all cases where the carrying out of any decree of the court under the provisions of this act shall involve the receipt of money, the court shall direct the person acting under the decree to file a bond to the commonwealth in a sufficient amount conditioned for the proper application of all moneys to be received. Such bond shall inure to the benefit of all persons interested and be executed by two individual sureties or by one corporate surety, approved by the court. No such decree shall be executed until such bond, with sureties as may be required, shall be filed: *Provided*, That where a corporation, duly authorized by law, shall be designated to carry out any such decree, the court may, in lieu of security as aforesaid, permit such corporation to enter its own bond without surety.

NOTE.—This is a copy of Section 16 (f) of the Fiduciaries Act. (See 437 *infra*.) See the note to that section.

36. DISCHARGE OF LIENS BY SALE.

SECTION 26. All public or private sales of real estate or of any part or purpart thereof, under the provisions of this act, shall have the effect of judicial sales as to the discharge of liens upon the real estate or part or purpart thereof so sold.

NOTE.—This supplies Section 42 of the Act of February 24, 1834, P. L. 81, 3 Purd. 3439, which extended to sales in partition the provision of Section 21 of the Act of April 19, 1794, 3 Sm. L. 143, as to discharge of real estate from the debts of the decedent.

37. RECOGNIZANCE BY PURCHASER.

SECTION 27. In all cases of sales of real estate under the provisions of this act, when the entire purchase money shall not be paid in cash, the purchaser or purchasers shall enter recognizance in the orphans' court, with sufficient security, to be approved by said court, for the payment of the purchase money, or any balance thereof, over and above the costs and expenses of said proceedings, to the parties who may be entitled to the same. Such recognizance shall be a lien on the real estate so sold until fully paid and satisfied.

NOTE.—This is founded on the last part of Section 1 and Section 2 of the Act of May 23, 1871, P. L. 274, 3 Purd. 3446, substituting "parties" for "widow, heirs or legatees."

Section 2 of the Act of 1871, 3 Purd. 3446, provides that before bringing suit on such recognizance the person entitled to receive the money shall give a refunding bond, and that if he is unable to do so, the money shall be put at interest as directed in Section 41 of the Act of February 24, 1834.

As is noted under Section 47 (*b*) of the Fiduciaries Act (see 549 *infra*) Section 41 of the Act of 1834, as to refunding bonds, has become obsolete and is recommended for repeal. Section 45 of the Act of 1834, relating to the giving of refunding bonds by distributees of the proceeds of real estate sold under order of the orphans' court, is also recommended for repeal. See note to Section 16 (*k*) of the Fiduciaries Act (see 447 *infra*).

Section 2 of the Act of 1871 is, therefore, also recommended for repeal.

38. NO OBLIGATION TO SEE TO APPLICATION OF PURCHASE MONEY.

SECTION 28. Whenever a public or private sale of real estate shall be directed or confirmed under the provisions of this act, the person or persons purchasing the real estate so sold and taking title thereto in pursuance of the decree of the court, shall take such title free and discharged of any obligation to see to the application of the purchase money.

NOTE.—This is copied from Section 16 (*p*) of the Fiduciaries Act (see 455 *infra*). It supersedes Section 1 of the Act of March 27, 1865, P. L. 45, 3 Purd. 3445, and Section 1 of the Act of April 28, 1868, P. L. 105, 3 Purd. 3445, relating to payment into court of the purchase money on a sale in partition, the former extending to sales in partition the provisions of Section 19 of the Act of February 24, 1834, P. L. 70, 1 Purd. 1122, which related to sales by executors under testamentary powers, and the Act of 1868 providing that the court might, in its discretion, require payment into court or make such order as might be just in the premises.

As is noted under Section 30 of the Fiduciaries Act (see 496 *infra*), Section 19 of the Act of 1834 was superseded by the Act of June 10, 1911, P. L. 874, 7 Purd. 7703, which relieves purchasers of obligation to see to the application of purchase money, and is the basis of Section 30 of the Fiduciaries Act.

39. WIDOW'S INTEREST TO REMAIN IN HANDS OF PURCHASER.

SECTION 29. Where a decree for the sale of real estate shall be made by the orphans' court, in the event provided for in Section 21¹ hereof, the court shall direct that, if there be a widow entitled to a life interest in such real estate under the intestate laws, or should such widow elect to take against the will and thereby be entitled to such life estate, the share of the widow in the purchase money shall remain in the hands of the purchaser, during the natural life of the widow. The interest thereof shall be semi-annually and regularly paid to her by the purchaser, his heirs and assigns, holding the premises, and may be recovered by distress or otherwise as rents are recoverable in this commonwealth, which the said widow shall accept in full satisfaction of her dower in such premises; and at her decease, her share of the purchase money shall be paid to the persons legally entitled thereto.

NOTE.—This is Section 43 of the Act of March 29, 1832, P. L. 203, 3 Purd. 3440, which was founded on Section 5 of the Act of April 14, 1828, P. L. 484 (10 Sm. L. 246).

The only changes now made are to insert in lines 3 and 4, the words "if there be a widow entitled to a life interest in such real estate," instead of the words "if there be one," and to change "annually" to "semi-annually."

¹(See 30 *supra*.)

The fact that the Orphans' Court Partition Act of 1917 (P. L. 338) in Sections 15, 18 and 29 appears to concede to the widow a lesser estate in lands of the decedent than that conferred by the Intestate Act of 1917 (P. L. 431) approved the same day, does not in any way affect the quantum of the estate taken by the widow under the latter act. If there were any conflict between the two Acts, the Intestate Act must govern as to the interest taken, the Partition Act having to do merely with procedure and the enforcement of rights conferred by the Intestate Act. But the alleged conflict is only apparent, and the references in the Partition Act to the life estate of the widow are evidently intended to refer to estates of persons dying prior to the Intestate Act of 1917.

Dodd's Est., 1 Wash. 236. (See extract from opinion under Sec. 21, *supra*.)

40. OTHER UNDIVIDED LIFE INTERESTS TO REMAIN CHARGED ON REAL ESTATE.

SECTION 30. In the case of a sale of real estate under proceedings in partition in the orphans' court, should any person other than the widow of the decedent be entitled, under the intestate laws, or should any person, including the widow of the decedent, be entitled under the will of the decedent to a life interest in an undivided share of the real estate, the share of such person shall not be paid to him or her, but shall remain charged on such or other real estate, according to the directions of the court; and the legal interest thereof shall be semi-annually and regularly paid by the purchaser of such real estate, his heirs or assigns, holding the same, during the natural life of such life tenant, and the same may be recovered by such life tenant as debts of like nature in this commonwealth are recoverable, and on the death of the life tenant, the said principal sum shall be paid by the person by whom the said real estate shall have been purchased, his heirs or assigns, holding the premises, to the persons thereunto legally entitled.

NOTE.—This includes the first part of Section 46 of the Act of February 24, 1834, P. L. 82, 3 Purd. 3445, which was new in that act. It is now altered to conform to Section 19 of this draft (see 28 *supra*). The remainder of the section relates to sales for the payment of debts, and is covered in the Fiduciaries Act.

41. APPOINTMENT OF TRUSTEE TO HOLD PRINCIPAL OF SUM IN WHICH THERE IS A LIFE INTEREST.

SECTION 31. In any case of a sale of real estate under the provisions of this act, instead of the life interest of any person in an undivided share of the real estate remaining charged on the real estate as aforesaid, the court may, on petition of the person entitled to the life interest, or of the purchaser, direct the purchaser to pay such principal sum to a suitable person or corporation, who shall be appointed by the court as trustee to receive and hold such principal sum, invest the same in securities authorized by law, pay the income thereon, after deducting all legal charges, to the person entitled thereto, and, upon the death of such person, to pay over such principal sum to the persons thereunto legally entitled, after deducting all legal charges thereon. Such trustee shall enter such security as the court may direct, and shall not be an insurer of the trust fund, and shall be liable to the persons interested in the income or corpus of the trust fund only for such care, prudence and diligence in the execution of the trust as other trustees are liable for.

NOTE.—This is a new section intended to provide a method of relieving the real estate of the charge of a life interest in an undivided share. Its provisions are founded to some extent on Section 23 of the Fiduciaries Act (see 469 *infra*).

42. PROCEDURE WHERE EXECUTOR, ADMINISTRATOR, OR TRUSTEE BECOMES INCAPABLE, IS REMOVED OR DIES.

SECTION 32. In all cases where the letters testamentary or of administration shall be revoked, or the executor, administrator or trustee, or one or more of the co-executors, co-administrators or co-trustees, authorized to make a sale of real estate under the provisions of this act, shall be removed by the court, or shall die, or become insane, or otherwise be incapable, before such sale is effected or before a deed of conveyance is made to the purchaser, such sale or such conveyance shall be made in the manner and with the effects as provided by law in other cases of sales by executors, administrators or trustees, under like circumstances.

NOTE.—This is a new section. Repetition of the provisions of Section 16 (j) (see 441-6 *infra*) of the Fiduciaries Act seems unnecessary.

Section 47 of the Act of 1832, 3 Purd. 344I, providing for execution of the deed where an executor, administrator or guardian who has made

a sale becomes incapable, is removed or dies, applies to all sales under order of the orphans' court. It and the related acts are covered by Section 16 (*j*) (see 441-6 *infra*) of the Fiduciaries Act.

Section 4 of the Act of April 9, 1849, P. L. 525, 3 Purd. 3441, makes similar provisions where a trustee appointed by the court to make a sale in partition is removed, dies or becomes incapable before making conveyance.

43. APPOINTMENT OF AUDITOR TO ASCERTAIN LIENS OR INCUMBRANCES.

SECTION 33. In all cases where, in consequence of proceedings in partition, the share, or any part thereof, of a party in interest, in real estate, shall be converted into money, either by reason of the impracticability or inequality of partition, or by virtue of a sale or otherwise, the orphans' court, before making a final decree confirming the partition or distributing the proceeds of sale, as the case may be, may appoint a suitable person as auditor, to ascertain whether there are any liens or other incumbrances on such real estate, affecting the interests of the parties. If it shall appear by the report of such auditor or otherwise, that there are such liens, the court may order the amount of money which may be payable to any of the parties against whom liens exist, to be paid into court, and shall have full power to decree the distribution thereof among the creditors or others entitled thereto. Where recognizance or other security shall be given for the payment of money, the court may make an order on the party giving such recognizance or other security, to pay the amount thereof into court, when the same shall become due, to be distributed in like manner among the persons holding liens at the time of the partition.

NOTE.—This is Section 49 of the Act of 1832, 3 Purd. 3442, which was new in that act.

The changes now made are to substitute "a party in interest" for "an heir" in line 3; the words from "distributing" to "may be," for "sale as aforesaid" in line 7; "full power to decree" for "the like power as to" in line 15; and "entitled thereto" for "as is now exercised by the courts of common law, where money is paid into court by sheriffs or coroners," in line 17.

Section 45 of the Act of February 24, 1834, P. L. 82, 1 Purd. 1122, relating to the giving of refunding bonds by distributees of the proceeds of real estate, applies to all sales under order of the orphans' court, including partition. In a note to Section 16 (*k*) of the Fiduciaries Act (see 447 *infra*) the above section is recommended for repeal. There seems to be no reason for re-enacting it as to partition sales only.

Section 48 of the Act of 1832, 3 Purd. 3444, and Section 1 of the Act of April 13, 1869, P. L. 28, 3 Purd. 3446, relating to payment to a husband of money awarded to his wife in partition proceedings, would seem to be obsolete since the Married Women's Acts and the act abolishing separate acknowledgments. Their repeal is therefore recommended.

44. ACCOUNT OF EXECUTOR, ADMINISTRATOR, OR TRUSTEE.

SECTION 34. Upon the sale of any real estate by an executor, administrator or trustee, in proceedings in partition in the orphans' court, it shall be the duty of the said executor, administrator or trustee to file in the orphans' court of the proper county an account of the proceeds of such sale.

NOTE.—This is Section 1 of the Act of April 11, 1863, P. L. 341, 3 Purd. 3445, altered by inserting "executor" in lines 2 and 4, by changing "after" to "in" in line 2, by substituting "orphans' court" for "office of the register," and by substituting "the proceeds of such sale" for "his said administration or trusteeship," and omitting, at the end, "in the same manner as is required by law in the settlement of estates of decedents."

45. COSTS AND COUNSEL FEES,—IN GENERAL.

SECTION 35. (a) The costs in all cases of partition in the orphans' court, with a reasonable allowance to the petitioners for counsel fees, to be taxed by the court, or under its direction, shall be paid by all the parties, in proportion to their several interests.

NOTE.—This is Section 1 of the Act of April 27, 1864, P. L. 641, 3 Purd. 3455, so far as it relates to the orphans' court. The act is not to be repealed so far as it relates to the common pleas.

Section 36 of the Act of March 29, 1832, 3 Purd. 3423, provides that the orphans' court shall have power "to give judgment * * * that the costs thereof be paid by the parties concerned." This seems to have been supplied by the Act of 1864, and is now recommended for repeal.

Counsel fees in partition cases must be based on compensation for the usual and accustomed service in each case. In case of a contest between the heirs, compensation for such services must be paid by individual heirs, and cannot be taxed against all of them.

"The Partition Act of 1917 is, with slight verbal changes an exact reproduction of the Act of 1864..... There is no room for doubt as to what the Legislature intended by this enactment. While in the ordinary course of practice, a partition was for the benefit of all the owners of the property divided, before the act the entire burden of the compensation of counsel for conducting the formal proceeding was thrown upon thepetitioners in the orphans' court. In every case professional aid was indispensable, and the purpose of the statute was to divide the cost

of the employment of that aid amongst the parties equally benefited by the result of the proceedings. But it was indispensable aid only that was contemplated—such usual and accustomed service as the exigencies of each case should render necessary. The compensation of counsel for services in the trial of contested causes was not the end in view." Quoting from Grubb's Appeal, 82 Pa. 23. Per Stewart, P. J., in *Klase's Est.* 18 North 46.

46. IN CASES OF SALES.

(b) In all cases of sales of real estate, under the provisions of this act, it shall be lawful for the court to order and decree that the costs and expenses of said proceedings, including a reasonable compensation to the executor, administrator or trustee by whom said sale shall be made, shall be paid, on the confirmation of such sale, out of the proceeds thereof.

NOTE.—This is the first part of Section 1 of the Act of May 23, 1871, P. L. 274, 3 *Purd.* 3446, with slight changes in phraseology, and the substitution of "out of the proceeds thereof" for "by the court," at the end. In line 2, the words, "and may" are omitted after "shall."

47. PRIVATE SALES,—WHEN ORDERED.

SECTION 36. (a) When any orphans' court having jurisdiction of any proceedings in the partition of real estate shall order, or has ordered, any such real estate or any purparts thereof to be sold, said court may authorize or direct a private sale thereof, or may approve, ratify and confirm a private sale thereof made under an order for a public sale, if in the opinion of the court, under all the circumstances, a better price can be obtained at a private sale than at a public sale thereof.

NOTE.—This is Section 1 of the Act of May 22, 1895, P. L. 114, 3 *Purd.* 3454, limited to the orphans' court. So far as it relates to the common pleas, the repeal of that section is not recommended.

In lines 4 and 5, "authorize or direct" is substituted for "decree and approve." The provision for security is omitted, being covered by Section 25 of this draft (see 35 *supra*).

48. NOTICE OF SALE.

(b) Before authorizing or directing any private sale of real estate under this act, public notice thereof shall be given by advertisement printed in at least one newspaper, published in the county where such real estate is situated, and in such other

papers as may be designated by the court, once a week for a period of three weeks prior to the date fixed by such order for authorizing or confirming such sale, and also written or printed notices, one of which shall be posted at a conspicuous place on the real estate proposed to be sold, and at least three of which shall be posted at three of the most public places in the vicinity of such real estate. Before authorizing or directing such sale, the court shall require proof, by affidavit to be filed in the proceeding, that notice as aforesaid has been given. Such notice shall specify the location and description of the real estate proposed to be sold, the name of the proposed purchaser and the price agreed to be paid.

NOTE.—This is copied from Section 16 (m) 2 of the Fiduciaries Act (see 451 *infra*).

49. SETTING ASIDE SALE.

(c) On the day fixed by such order and notice for authorizing or directing such private sale, any party interested as heir, devisee or intending purchaser, or any legatee whose legacy is, by the express terms of the will, or by law, charged on such real estate, may appear and object to such private sale on account of the insufficiency of the price, and, if such objection be sustained, may offer to give or pay a substantial increase for such property. The court, at its discretion, may thereupon authorize or direct such sale, or refuse to authorize or direct the same, and accept any substantially increased offer, and may authorize the sale of such property to such new bidder upon compliance with the conditions of sale and giving such security as shall be directed by the court. Such party interested or legatee may appear as aforesaid and object to such sale on any legal or equitable grounds. Nothing herein contained shall be construed to affect the existing law with respect to objections to public sales.

NOTE.—This is copied, with slight modification, from Section 16 (m) 3 of the Fiduciaries Act (see 452 *infra*).

50. LANDS IN ADJOINING TRACTS IN DIFFERENT COUNTIES.

SECTION 37. When the lands, in respect to which application for partition shall be made to the orphans' court as aforesaid, lie in one or more adjoining tracts, in different counties, it shall be lawful for the orphans' court of the county in which the

mansion house is situated, or, if there be no mansion house, the court of the county where the principal improvements may be, or, if there be no improvements, the court of either county, on the application of any person interested, either to proceed by the appointment of commissioners as aforesaid, or to issue its writ to the sheriff of the county within the jurisdiction of the court, specifying the lands of which a partition or valuation is to be made. Thereupon the said sheriff shall summon an inquest to divide or value the said lands, in the same manner as if the whole were within his proper bailiwick. Upon the return thereof, or upon the return of the commissioners appointed by the court, as aforesaid, the court may further proceed therein, in all respects as if all the said lands were in the county. Any recognizance taken in pursuance of such proceedings shall be as effectual, to all intents and purposes, as if the lands bound by it were wholly within the county where such recognizance is taken. A certified copy of the proceedings which may be had shall, within twenty days after the final decree therein, be delivered to the clerk of the orphans' court of each county in which the application shall not have been made, and in which any part of the said lands are situate, which shall be entered on the records of such court at the joint expense of all parties concerned.

NOTE.—This is Section 44 of the Act of March 29, 1832, 3 *Purd.* 3447, which was founded on Section 1 of the Act of April 1, 1805, P. L. 205. 4 *Sm. L.* 246. It is now altered by inserting the provisions as to the mansion house, improvements, etc., as used in the *Fiduciaries Act*. In the proviso, "certified copy" is substituted for "exemplification."

51. LANDS IN DIFFERENT COUNTIES, BUT NOT IN ADJOINING TRACTS,—WHERE PROCEEDINGS SHALL BE BROUGHT.

SECTION 38. (a) All proceedings for the partition or valuation of real estate, under the provisions of this act, where the real estate to be divided or valued is situate in two or more counties of this commonwealth, but not in adjoining tracts, shall be brought only in the county where the decedent, whose land is to be divided or valued, had his domicile, or if he had no domicile in the state, then in the county where the larger part of the estate in value shall be situated; or, with leave of such court, the parties interested may institute proceedings in the orphans' court in each county where such real estate is situated.

NOTE.—This is founded on Section 1 of the Act of February 20, 1854, P. L. 89, 3 Purd. 3447, so far as the same relates to the orphans' court, and Section 1 of the Act of April 17, 1856, P. L. 386, 3 Purd. 3448, construing the former.

The Act of 1854 includes the common pleas and is not to be repealed in that regard.

After "real estate" in line 2, the words "the recovery of dower or the widow's third or other part" have been omitted as unnecessary, the widow's remedy in the orphans' court being now by partition proceedings. The word "recovered" is omitted after "valued" in two places, for the same reason. The words "if he had no domicile in this state, then" have been substituted for "the homestead"; and after "shall be situated" the words "or any defendant may be found" are omitted. The last clause is substituted for the provisions of the Act of 1856, which are unnecessarily obscure but which mean the same as the substituted clause.

Section 2 of the Act of May 14, 1874, P. L. 156, 3 Purd. 3449, supplemental to the Act of 1854, provides that "Nothing contained in this act or the acts to which it is a supplement, shall be so construed as to prevent any tenant in common or joint-tenant of real estate, situated in two or more counties of this commonwealth, from bringing a separate suit, either at law or in equity, in either or any of such counties, for partition or valuation of so much of such real estate as is situated therein, except in the case where such real estate consists of single tracts lying in adjoining counties." This is recommended for repeal, so far as it relates to the orphans' court.

52. SERVICES OF PROCESS AND NOTICES.

(b) In proceedings under this section, all process, writs and notices required to be served personally upon any person or persons interested in such proceedings may be served by the sheriff of any county of this state under deputation from the sheriff of the county in which such proceedings have been instituted or commenced.

NOTE.—This is taken from Section 1 of the Act of April 17, 1856, P. L. 386, 3 Purd. 3448, with the addition of the provision for service in any county of the commonwealth.

Section 1 of the Act of February 20, 1854, P. L. 89, 3 Purd. 3447, provides that "service of process may be made by any sheriff, where real estate to be divided shall be situated, or any defendant may be found."

53. SELECTION OF COMMISSIONERS OR JURORS; COMPENSATION AND MILEAGE.

(c) The commissioners or jurors for making partition or valuation under the provisions of this section may be selected from the county in which such proceedings are instituted, or from

any one or more of the counties in which such land is situate. The compensation and mileage of said commissioners or jurors shall be the same as is provided in Section 7¹ of this act.

NOTE.—This is derived from Sections 1 and 2 of the Act of April 17, 1856, P. L. 386, 3 Purd. 3448. That act specially provides for the sheriff's fees and the jurors' fees and mileage. Commissioners are now included, provision is made that the commissioners or jurors may be selected from any one or more of the counties instead of only from the county where the proceedings are instituted, and reference is made to Section 7 of this draft for the provisions as to their compensation and mileage. The provision that the sheriff shall receive two dollars a day for each day after the first, is omitted, since it is properly covered by the sheriff's fee bills.

¹(See 9 *supra*.)

54. SALES.

(d) This section shall include all proceedings in partition necessary to be had, as well before as after the refusal of the parties to take real estate at the valuation; and the said courts in which such proceedings are had, are hereby authorized to order the sale of such real estate, after such refusal, in the same manner as if all the real estate were situated in the county in which such proceedings are instituted: *Provided*, That the sales of such real estate shall be held in the county in which the real estate is situated, unless otherwise ordered by the said courts.

NOTE.—This is part of Section 1 of the Act of March 30, 1869, P. L. 15, 3 Purd. 3448, supplemental to the Act of 1854.

55. PROCEEDINGS NOT SPECIALLY PROVIDED FOR IN THIS SECTION.

(e) Except as otherwise provided by this section, the proceedings hereunder shall be the same as provided by this act in other cases of partition and valuation.

NOTE.—This is taken from the last clause of Section 1 of the Act of May 14, 1874, P. L. 156, 3 Purd. 3449.

56. FILING CERTIFIED COPIES IN OTHER COUNTIES.

(f) Certified copies of the record may be filed in every county where such real estate shall be situated, in the office of the clerk of the orphans' court thereof, and be received in evidence, with the like effect, as the records of the court where filed.

NOTE.—This is taken from the last part of Section 1 of the Act of February 20, 1854, P. L. 89, 3 Purd. 3447, substituting "certified copies" for "exemplifications."

57. RECOGNIZANCES IN GENERAL,—ASCERTAINMENT OF AMOUNTS DUE.

SECTION 39. (a) In all cases of partition in the orphan's court, where the court shall order and decree any party taking any portion of the estate at a bid or at the appraisement, or purchasing the same at a sale, as hereinbefore provided, to give any recognizance for the payment of any part of bid, valuation or purchase price, the court shall have power to appoint an auditor for the purpose of ascertaining advancements and making distribution among the heirs and parties in interest. In all cases in which such auditor has not been or may not be appointed, it shall be the duty of the court to make a calculation exhibiting the amounts due the respective parties in interest, and to direct the clerk of the court to record said calculation upon the partition docket of the court as a part of the proceedings in each case, for which services the clerk shall be entitled to a fee of one dollar.

NOTE.—This is Section 1 of the Act of April 12, 1855, P. L. 214, 3 Purd. 3436, modified so as to authorize the court to appoint an auditor, and to provide that the court, instead of the clerk, shall make the calculation and that it shall be recorded in the partition docket.

58. SATISFACTION,—OF RECORD.

(b) 1. Where a recognizance has been or shall hereafter be taken in any orphans' court, in any partition proceeding, as hereinbefore provided for, and the same, or any part thereof, shall be satisfied or paid to the person or persons interested therein, his, her or their agent or attorneys, any such person so having received satisfaction of the amount coming to him, shall enter an acknowledgment thereof upon the record of such court, which shall be satisfaction and discharge of the said recognizance, to the amount acknowledged to be paid; and the recognizance shall cease to be a lien on the real estate of the conusor to a greater amount than the principal and interest actually remaining due.

NOTE.—This is Section 50 of the Act of March 29, 1832, 3 Purd. 3435, which was derived from the first clause of Section 6 of the Act of April 14, 1828, P. L. 484, 10 Sm. L. 246, but omitted all reference to bonds as

distinguished from recognizances. It is now made applicable to all cases of recognizance in partition, and not merely to cases of acceptance at the appraisement.

59. REMEDY FOR REFUSING TO SATISFY.

2. If any person who shall have received satisfaction as aforesaid, for his claim or lien secured by such recognizance, shall neglect or refuse to enter upon the record his acknowledgment thereof, upon the written request of the owner of the premises, bound by such recognizance, or of any part thereof, or of his legal representatives, or other persons interested therein, on tender of all the costs for entering such acknowledgment, the orphans' court, on due proof to them made that the entire amount due to any heir, legatee or distributee, shall have been fully paid and discharged, may make an order for the relief of such person from any recognizance or other recorded lien. Such order, being certified to the proper court where such lien may appear, shall be entered on the records, and shall inure and be received as a full satisfaction and discharge of the same.

NOTE.—This is Section 51 of the Act of March 29, 1832, 3 Purd. 3436, which was founded on part of Section 6 of the Act of April 14, 1828, P. L. 484, 10 Sm. L. 246. The Commissioners' Draft did not contain the provision as to action by the orphans' court.

The provision for a penalty of fifty dollars and damages to be assessed by a jury on a trial at law is now omitted, the remedy in the orphans' court being considered sufficient.

Sections 22 and 23 of the Act of April 26, 1850, P. L. 581, 3 Purd. 3436, so far as they relate to such recognizances, are recommended for repeal. Those sections extend to legacies and recognizances the provisions of the Act of March 31, 1823, P. L. 216, 8 Sm. L. 131, 1 Purd. 1187, relating to satisfaction of mortgages. The incorporation of those provisions in the present draft, by mere reference would raise a question of constitutionality and there seems to be no need for doing so.

60. PROTECTION OF INTERESTS OF PERSONS NOT IN ESSE.

SECTION 40. In all cases arising under this act, where there is a limitation of an estate or interest in the premises or some part thereof to a person or persons not in existence, the court shall have power to appoint a trustee to represent such unborn person or persons in the proceedings, and shall have power to make such further or other orders in regard to the property or purpart in which such person or persons may become interested, or the

proceeds of the sale thereof, or any recognizance given with respect thereto, as justice and equity may require.

NOTE.—This is founded on the second proviso to Section 1 of the Act of June 3, 1840, P. L. 593, 3 *Purd.* 3412, which relates only to "writs of partition," as construed in *Holmes v. Woods*, 168 Pa. 530.

Although under the terms of the will creating the trust, there is to be no distribution until after the death of the wife and testator's last surviving brother or sister, at which time the class of distributees is to be determined, which is likely to include children not yet born, there is no necessity for the appointment of a trustee for such unborn children, as the trustee appointed by the will has full custody and control, as an active trustee, of both corpus and income of said estate, and is responsible for a proper distribution when the time arrives. The trustee has power and authority to represent all cestuis que trustent, whether in esse or not, in any litigation affecting the trust.

"The third matter of law brought up by the answer, raises the question of law whether or not the interests of the unborn persons, if any, in the decedent's real estate involved in this cause are, by said will, effectively reposed in the respondent as such trustee thereby appointed, who would thus be lawfully authorized and in duty bound, to represent such interests in this proceeding or whether such interests of unborn persons, if any, should be represented and protected in this cause by a trustee to be appointed by this court for that special purpose under Section 40 of the Orphans' Court Partition Act of 1917, P. L. 337.

"We are of the opinion that no such special trustee need here be appointed for the purpose of representing and protecting such interests of persons not in esse, if any, believing that such interests, if any, have been by the testator himself duly committed to and effectually reposed in the respondent as trustee, who is thus duly clothed with absolute power and authority to represent such unborn persons, if any, and their rights and interests to, in and concerning the said real estate in this cause."

Dodd's Estate, 1 *Wash.* 236.

61. PARTITION DOCKET.

SECTION 41. It shall be the duty of the clerks of the orphans' courts of the several counties of this commonwealth, and they are hereby required to enter in a book to be procured for that purpose, to be called a partition docket, all the proceedings in partition in every case in their respective courts, from the commencement to the final judgment and decree thereon, which shall be and the same is hereby made the record of said court; for which service, such clerks shall be entitled to receive the same fees as the recorders of deeds receive for recording, to be taxed and paid as part of the costs of such proceedings.

NOTE.—This is Section 1 of the Act of April 4, 1889, P. L. 23, 3 Purd. 3436.

62. PARTITION INDEX.

SECTION 42. It shall be the duty of the clerks of the orphans' courts of the several counties of this commonwealth, and they are hereby required, to keep a separate index, to be known as the partition index, in which shall be entered in alphabetical order the names of all persons to whom any real estate shall be allotted or awarded in partition proceedings in said courts, and the names of all purchasers of real estate in such proceedings.

NOTE.—This is a new section, introduced in order to facilitate searches of title. In the absence of such index, it is often very difficult to trace back a title to a partition proceeding, since the records of the orphans' court show the proceeding only under the name of the decedent.

63. APPEALS.

SECTION 43. Any party aggrieved by any definitive decree or judgment of any orphans' court, or by any order or decree awarding or refusing to award an inquest, or by an order of sale, under the provisions of this act, may appeal therefrom to the proper appellate court as in other cases of appeals from the orphans' court.

NOTE.—This is a new section, intended to permit an appeal from an order awarding an inquest, which has been held to be an interlocutory order from which an appeal does not lie: Wistar's Appeal, 115 Pa. 241; Gesell's Appeal, 84 Pa. 238; Christy's Appeal, 110 Pa. 538, and from an order of sale in partition, which has also been held to be interlocutory; see Robinson's Appeal, 62 Pa. 213; Robinson v. Glancy, 69 Pa. 89; Snodgrass' Appeal, 96 Pa. 420.

Where questions of the right of partition, involving, for example, adverse claims of title, or the construction of a will, are determined in awarding the inquest it seems that it should be possible to have this decision reviewed without waiting until after the allotment of purparts or confirmation of a sale.

Section 15 of the Act of April 5, 1842, P. L. 236, 2 Purd. 1434, permits a writ of error to a judgment *quod partitio fiat* in actions of partition at law. There seems to be no reason why a similar allowance should not be made in partition in the orphans' court.

64. SHORT TITLE SECTION.

SECTION 44. This act shall be known and may be cited as the Orphans' Court Partition Act of 1917.

65. REPEALER.

SECTION 45. The following acts and parts of acts of assembly are repealed as respectively indicated. The repeal of the first section of an act shall not repeal the enacting clause.

Section 22 of an act entitled “An Act directing the descent of intestates’ real estates, and distribution of their personal estates, and for other purposes therein mentioned,” passed April 19, 1794, 3 Sm. L. 143, absolutely.

Section 8 of an act entitled “An Act supplementary to the act entitled ‘An Act directing the descent of intestates’ real estates, and distribution of their personal estates, and for other purposes therein mentioned,’ ” passed April 4, 1797, 3 Sm. L. 296, in so far as it relates to the orphans’ court.

An act entitled “A further supplement to the act entitled ‘An Act directing the descent of intestates’ real estates and distribution of their personal estates, and for other purposes therein mentioned,’ ” approved April 2, 1804, P. L. 459, absolutely.

An act entitled “A further supplement to an act, entitled ‘An Act directing the descent of intestates’ real estates and distribution of their personal estates, and for other purposes therein mentioned,’ ” approved April 1, 1805, P. L. 205, absolutely.

Sections 6, 7 and 8 of an act entitled “An Act supplementary to the several acts of this commonwealth concerning partitions, and for other purposes therein mentioned,” approved April 7, 1807, P. L. 155, absolutely, and Section 9 of said Act in so far as it relates to the orphans’ court.

Section 2 of an act entitled “An Act to amend certain parts of an Act, entitled ‘An Act supplementary to the several Acts of this commonwealth, concerning partitions and for other purposes therein mentioned,’ ” approved March 26, 1808, P. L. 144, absolutely.

Sections 5 and 6 of an Act entitled “A supplement to the Act, entitled ‘A further supplement to the Act, entitled an Act to alter the judiciary system of this commonwealth,’ passed the eighth day of April, eighteen hundred and twenty-six,” approved April 14, 1828, P. L. 484, absolutely.

Sections 36 to 46 inclusive, and 48 to 51 inclusive, of an Act entitled “An Act relating to orphans’ courts,” approved March 29, 1832, P. L. 190, absolutely.

Sections 42, 44, 45 and 46 of an Act entitled "An Act relating to executors and administrators," approved February 24, 1834, P. L. 73, absolutely.

Section 2 of an Act entitled "Supplement to the Act passed the twenty-ninth day of March, Anno Domini, one thousand eight hundred and thirty-two, entitled 'An Act relating to orphans' courts,'" approved April 14, 1835, P. L. 275, absolutely.

Section 4 of an Act entitled "A further supplement to an Act, entitled an Act relating to orphans' courts, passed the twenty-ninth day of March, one thousand eight hundred and thirty-two, and the supplement thereto, passed the fourteenth of April, one thousand eight hundred and thirty-five, and for other purposes," approved April 13, 1840, P. L. 319, absolutely.

Section 8 of an Act entitled "An Act to incorporate the Butler County Mutual Insurance Company, and for other purposes," approved April 24, 1843, P. L. 359, absolutely.

An Act entitled "An Act supplementary to the acts relating to orphans' courts," approved April 6, 1844, P. L. 214, absolutely.

Section 1 of an act entitled "A supplement to the Act of Assembly, passed the twenty-ninth March, one thousand eight hundred and thirty-two, relating to the proceedings in the orphans' court of this commonwealth, and for other purposes," approved April 15, 1845, P. L. 458, absolutely.

Section 1 of an Act entitled "An Act in relation to partitions," approved April 21, 1846, P. L. 426, absolutely.

An Act entitled "An Act relative to the orphans' court," approved March 13, 1847, P. L. 319, absolutely.

Section 4 of an Act entitled "A supplement to an act relative to the venders of mineral waters; and an act relative to the Washington Coal Company; to sheriffs' sales of real estate; to the substitution of executors and trustees when plaintiffs; to partition in the courts of common pleas, and for other purposes," approved April 9, 1849, P. L. 524, except in so far as it relates to sales made before its date.

Section 10 of an Act entitled "An Act to enable Thomas Hoge to make a fee-simple title; to enable the trustees under the wills of Ephraim Clark and Catharine Yohe, Alex. Calder, administrator, Joseph B. Baker, guardian, and Nancy, John, and William Kline to sell certain real estate; relative to a school house in Elizabeth Township, Lancaster County; to amend the charter of the Second Jackson Beneficial Society of Philadelphia,

and to extend the jurisdiction of the orphans' court," approved April 10, 1849, P. L. 591, except in so far as it validates partition proceedings begun before its date.

Section 2 of an Act entitled "An Act relating to the bail of executrices; to partition in the orphans' court and common pleas; to colored convicts in Philadelphia; to the limitation of actions against corporations; to actions enforcing the payment of ground rent; to trustees of married women; to appeals from awards of arbitrators by corporations; to hawkers and pedlers in the counties of Butler and Union; to the payment of costs in actions by informers in certain cases; to taxing lands situate in different townships; and in relation to fees of county treasurers of Lycoming, Clinton and Schuylkill; to provide for recording the accounts of executors, administrators, guardians and auditors' reports; and to amend and alter existing laws relative to the administration of justice in this commonwealth," became a law April 25, 1850, by reason of the Governor's failure to return it within ten days, P. L. 569, absolutely, and Section 10 of the same act in so far as it relates to the orphans' court.

Sections 22 and 23 of an Act entitled "An Act to incorporate the Wyoming County Mutual Insurance Company; relating to Library Street, in the city of Philadelphia; giving jurisdiction to the Court of Common Pleas in Tioga County, in a certain divorce case; and relating to paving in front of the prison in the county of Philadelphia," approved April 26, 1850, P. L. 577, in so far as they relate to recognizances in partition.

Section 1 of an Act entitled "An Act relative to suits in dower and partition," approved February 20, 1854, P. L. 89, in so far as it relates to the orphans' court.

An Act entitled "A further supplement to the Act, entitled 'An Act relating to orphans' courts,' passed the twenty-ninth day of March, one thousand eight hundred and thirty-two," approved April 12, 1855, P. L. 214, absolutely.

Section 4 of an Act entitled "An Act to amend certain defects of the law for the more just and safe transmission and secure enjoyment of real and personal estate," approved April 27, 1855, P. L. 368, in so far as it relates to the orphans' court.

Sections 1 and 2 of an Act entitled "A supplement to an Act relative to suits in dower and partition, passed twentieth February, one thousand eight hundred and fifty-four," approved April 17, 1856, P. L. 386, absolutely.

Section 10 of an Act entitled "An Act for the greater certainty of title and more secure enjoyments of real estate," approved April 22, 1856, P. L. 532, in so far as it relates to the orphans' court.

An Act entitled "An Act requiring administrators and trustees, upon the sale of real estate, after proceedings in partition, to file, in the register's office of the proper county, an account of their said administration, or trusteeship," approved April 11, 1863, P. L. 341, absolutely.

An Act entitled "An Act relative to costs in cases of partition," approved April 27, 1864, P. L. 641, in so far as it relates to the orphans' court.

An Act entitled "An Act relating to the committees of the estates of lunatics and habitual drunkards," approved March 22, 1856, P. L. 31, in so far as it relates to the orphans' court.

An Act entitled "An Act relating to proceedings in partition," approved March 27, 1865, P. L. 45, absolutely.

An Act entitled "A supplement to an Act relating to orphans' courts, approved the twenty-ninth day of March, Anno Domini one thousand eight hundred and thirty-two," approved January 7, 1867, P. L. 1367, absolutely.

An Act entitled "An Act to extend the jurisdiction of the orphans' court of York and Fayette Counties," approved February 13, 1867, P. L. 160, absolutely.

An Act entitled "An Act to repeal a portion of an Act, entitled 'An Act relating to proceedings in partition,' approved the twenty-seventh day of March, Anno Domini one thousand eight hundred and sixty-five," approved April 28, 1868, P. L. 105, absolutely.

An Act entitled "A supplement to an Act, entitled 'An Act relative to the orphans' court,' approved the thirteenth day of March, one thousand eight hundred and forty-seven, confirming certain partitions," approved February 26, 1869, P. L. 4, except in so far as it confirms partitions made before its date.

An Act entitled "A further supplement to an Act, entitled 'An Act relative to suits in dower and partition,' approved the twentieth day of February, Anno Domini one thousand eight hundred and fifty-four, and its supplement, approved the seventeenth day of April, Anno Domini one thousand eight hundred and fifty-six," approved March 30, 1869, P. L. 15, in so far as it relates to the orphans' court.

An Act entitled "A supplement to the Act relating to orphans' courts, approved the twenty-ninth day of March, Anno Domini one thousand eight hundred and thirty-two," approved April 13, 1869, P. L. 28, except in so far as it relates to declarations theretofore made by married women.

Section 2 of an Act entitled "An Act relating to dowers," approved April 20, 1869, P. L. 77, absolutely.

An Act entitled "A further supplement to an Act relating to orphans' court, approved the twenty-ninth day of March, one thousand eight hundred and thirty-two, regulating the sale of real estate by executors, administrators or trustees," approved May 23, 1871, P. L. 274, absolutely.

An Act entitled "A further supplement to an Act relative to suits in dower and partition, approved the twentieth day of February, Anno Domini one thousand eight hundred and fifty-four, and its supplement, approved the thirtieth day of March, Anno Domini one thousand eight hundred and sixty-nine, construing said Act and extending jurisdiction of the courts therein," approved May 14, 1874, P. L. 156, in so far as it relates to the orphans' court.

An Act entitled "An Act relating to the estates of decedents," approved May 14, 1874, P. L. 166, absolutely.

An Act entitled "An Act enlarging the powers of the orphans' court in regard to fixing the time for the payment of owelty," approved May 8, 1876, P. L. 140, absolutely.

An Act entitled "An Act relating to partition of real estate," approved May 1, 1879, P. L. 40, in so far as it relates to the orphans' court.

An Act entitled "An Act to provide for the keeping of a partition docket by the several clerks of the orphans' courts," approved April 4, 1889, P. L. 23, absolutely.

An Act entitled "An Act to enlarge the jurisdiction of the orphans' courts in cases of testacy," approved May 9, 1889, P. L. 146, absolutely.

An Act entitled "An Act relating to sale of the real estate of decedents," approved June 12, 1893, P. L. 461, absolutely.

An Act entitled "An Act relating to the partition of real estate, empowering the courts having jurisdiction to decree and approve and to approve, ratify and confirm private sales," approved May 22, 1895, P. L. 114, in so far as it relates to the orphans' court.

An Act entitled "An Act to provide for the liability of tenants in common in possession to their co-tenants out of possession," approved June 24, 1895, P. L. 237, in so far as it relates to the orphans' court.

An Act entitled "An Act relating to proceedings in partition and other actions, and for the appointment of committees, ad litem, therein when any of the defendants are lunatic," approved June 26, 1895, P. L. 381, in so far as it relates to the orphans' court.

An Act entitled "An Act amending an Act, entitled 'An Act relating to proceedings in partition and other actions, and for the appointment of committees, ad litem, therein when any of the defendants are lunatic or persons of weak mind,' approved the twenty-sixth day of June, one thousand eight hundred and ninety-five, so as to extend the same to proceedings in the orphans' court and to enlarge the powers of said committees," approved June 10, 1901, P. L. 533, in so far as it relates to the orphans' court.

An Act entitled "An Act relating to partition of real estate, and the appointment of a trustee to satisfy liens and to invest the moneys coming into his hands by proceeding in partition," approved April 3, 1903, P. L. 151, in so far as it relates to the orphans' court.

An Act entitled "A supplement to an Act, entitled 'An Act for the greater certainty of title and more secure enjoyment of real estate,' approved the twenty-second day of April, one thousand eight hundred and fifty-six; so as to authorize a widow to accept real estate in partition, or compete in bidding therefor, and regulating and establishing a mode of payment therefor by the widow," approved June 1, 1907, P. L. 364, in so far as it relates to the orphans' court.

An Act entitled "An Act to amend an Act, entitled 'A supplement to an Act, entitled "An Act for the greater certainty of title and more secure enjoyment of real estate," approved twenty-second day of April, Anno Domini eighteen hundred and fifty-six; so as to authorize a widow to accept real estate in partition, or compete in bidding therefor, and regulating and establishing a mode of payment therefor by the widow,' approved the first day of June, Anno Domini nineteen hundred and seven; by providing the method by which the dower interests of the widow, and the principal of the dower fund, should be secured in certain

cases," approved May 8, 1909, P. L. 489, in so far as it relates to the orphans' court.

An Act entitled "An Act to amend the Act, approved the twelfth day of June, Anno Domini one thousand eight hundred ninety-three, entitled 'An Act relating to sale of the real estate of decedents,'" approved May 23, 1913, P. L. 304, absolutely.

An Act entitled "An Act to amend section three of an Act, approved the fourteenth day of May, Anno Domini one thousand eight hundred seventy-four, entitled 'A further supplement to an Act relative to suits in dower and partition, approved the twentieth day of February, Anno Domini one thousand eight hundred and fifty-four, and its supplement, approved the thirtieth day of March, Anno Domini one thousand eight hundred and sixty-nine, construing said Act and extending jurisdiction of the courts therein,' by extending the provisions thereof to include persons having an undivided interest in the land, or in the coal or timber thereon, when the same has not been entirely severed, and permitting such persons to compel partition of the entire tract," approved May 6, 1915, P. L. 269, in so far as it relates to the orphans' court.

All other Acts of Assembly, or parts thereof, that are in any way in conflict or inconsistent with this Act, or any part thereof, are hereby repealed.

THE ORPHANS' COURT ACT

of

June 7, 1917 (P. L. 363)

PRELIMINARY NOTE BY COMMISSION

In revising the statutes relative to the orphans' court the Commissioners have not found it necessary or considered it advisable to recommend any changes of serious importance in its jurisdiction or procedure.

In Section 18 (*a*), 3 and 5, the writ of *fi. fa.* issued out of the orphans' court has been limited to personal property; and in Section 18 (*e*), provision has been made for filing in the court of common pleas transcripts of orders of the orphans' court for payment of money by others than fiduciaries, and for executions thereon against real property.

In Section 20 (*b*) and (*d*), the powers of the court in connection with the taking and perpetuation of testimony are revised and enlarged.

In Section 20 (*e*) 1, the Commissioners have inserted a provision which is understood to conform with the prevailing practice, according to which on appeals from the Register of Wills the proceedings shall be *de novo* unless by agreement the appeal be heard on the testimony taken before the Register; the court having the right, however, to require the production of witnesses.

In several sections the court is given enlarged powers with respect to the service of citations and notices to parties interested in estates, and to those amenable to the jurisdiction of the court, including attachments to enforce obedience to its orders.

In general, the method of giving notices to persons interested has been left to be fixed by general rules of court or special orders in particular cases, the Commissioners considering that fixed statutory regulations are often inappropriate.

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66. TITLE.

AN ACT

Relating to the organization, jurisdiction and procedure of the orphans' court, the powers and duties of the judges thereof, and appeals therefrom.

67. ORGANIZATION OF COURT;—COURT TO CONTINUE TO EXIST IN EACH COUNTY.

SECTION I. (a) Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same, That, In every county of this commonwealth, there shall continue to exist, as heretofore, a court of record, the name and style whereof shall be "The Orphans' Court of (the respective) County."

NOTE.—This is founded on Section 1 of the Act of May 19, 1874, P. L. 206, 3 Purd. 3360, which provides that such court shall be "organized and holden, on and after the first Monday of January, 1875." It is recommended that said section be not repealed.

68. SEPARATE ORPHANS' COURT IN CERTAIN COUNTIES; JUDGES, THEIR ELECTION, COMMISSIONS AND SALARIES.

(b) In the counties of Philadelphia, Allegheny, Luzerne, Berks, Schuylkill, Westmoreland, Montgomery, Lancaster, Lackawanna and Fayette, the orphans' court shall be a separate court of record, which shall consist, in the county of Philadelphia, of five judges learned in the law, any one of whom may hold the said court, and hear and determine all matters and things therein cognizable, in the county of Allegheny of three judges learned in the law, any one of whom may hold the said court and hear and determine all matters and things therein cognizable, and in the counties of Luzerne, Berks, Schuylkill, Westmoreland, Montgomery, Lancaster, Lackawanna and Fayette, each, of one judge learned in the law; and the said judges shall be elected at the same elections, and be commissioned for the same term and in the same manner as the judges of the courts of common pleas of the respective counties where separate orphans' courts are or shall be established. In the counties where separate orphans' courts are or shall be established, the annual salaries of said judges shall be the same as are paid to the judges of the courts of common pleas in the respective counties where such orphans' courts are or shall be established, to be paid in the same manner as the salaries of said judges of the courts of common pleas are now, or may be by law, payable.

NOTE.—This is Section 3 of May 19, 1874, P. L. 206, 3 Purd. 3360, as amended by the Act of June 13, 1883, P. L. 91, further amended so as

to conform to the subsequent legislation establishing separate orphans' courts in counties other than Philadelphia, Allegheny and Luzerne, by adding, in two places, after "hold the said court," the words, "and hear and determine," etc., and by altering the provision that the judges shall be elected "at the next general election."

Separate orphans' courts have been established as follows: Berks County, by Act of June 13, 1883, P. L. 97; Schuylkill County, by Act of March 28, 1895, P. L. 31; Westmoreland County by Act of April 11, 1901, P. L. 71; Montgomery County, by Act of May 2, 1901, P. L. 117; Lancaster County, by Act of July 11, 1901, P. L. 655; Lackawanna County, by Act of July 11, 1901, P. L. 657; and Fayette County, by Act of May 25, 1907, P. L. 260.

The Act of 1874 provided for three judges in Philadelphia County. The Act of April 28, 1887, P. L. 72, 3 Purd. 3361, provided for an additional judge, and the Act of March 22, 1907, P. L. 26, 6 Purd. 7034, provided for a fifth judge.

The Act of 1874 provided for one judge in Allegheny County. The Act of May 5, 1881, P. L. 12, added another judge, and the Act of July 18, 1901, P. L. 669, added a third.

These acts are not recommended for repeal.

Since the passage of this act separate orphans' courts have been established as follows: Cambria County by Act of June 4, 1919, P. L. 372; Washington County by Act of July 8, 1919, P. L. 736; Delaware County by Act of April 11, 1921, P. L. 121, and Erie County by Act No. 397, May 24, 1921.

69. COMPOSITION OF ORPHANS' COURT WHERE NOT SEPARATE.

(c) The orphans' court of each county, except in the counties where separate orphans' courts are or shall be established by law, shall be composed of the judge or judges, when there are more than one, of the court of common pleas thereof; but any one judge learned in the law shall have power to hold the court, and hear and determine all matters and things therein cognizable.

NOTE.—This is Section 2 of the Act of May 19, 1874, P. L. 206, 3 Purd. 3360, except that, in lines 2 and 3, the words beginning with "where" and ending with "law" have been substituted for "of Philadelphia, Allegheny and Luzerne."

The repeal of the Act of April 7, 1876, P. L. 19, 3 Purd. 3725, is recommended, so far as it relates to the orphans' court, since the above provisions of the Act of 1874 cover the matter.

70. PRESIDENT JUDGE OF SEPARATE ORPHANS' COURT; SENIOR JUDGE; DRAWING LOTS.

(d) 1. In all counties in which there is or hereafter may be established a separate orphans' court, the governor shall issue a

commission as president of said court, to the judge of said court, who shall be the oldest in commission and continuous service; and if there shall be two or more judges of any of said courts, whose commissions are of the same date, and whose term of service commenced at the same time, they shall draw lots for a commission as president of said court, and certify the result to the governor, who shall issue a commission as president of said court to the judge who shall draw the right to receive the same.

NOTE.—This and the following paragraphs of the present clause are copied from Sections 1 to 4 of the Act of May 24, 1878, P. L. 131, 3 Purd. 3361.

71. WHERE ONLY ONE JUDGE.

2. In all separate orphans' courts, composed of only one judge, he shall be styled the president judge of said court, and be commissioned as such.

72. RE-ELECTION.

3. When the president judge of any of said courts shall be re-elected, he shall be again commissioned as, and continue to be the president judge of said court; and when the said president judge shall go out of office, the judge of said court who shall be oldest in commission and continuous service shall be commissioned as, and be the president judge thereof.

NOTE.—In this clause, the word "as" has been inserted after "commissioned" in two places.

73. WHERE TWO OR MORE JUDGES ARE ELECTED AT SAME ELECTION.

4. Whenever, at any election, two or more judges of any of said courts are elected, who shall not have been commissioned and served as judges of said court immediately before the commencement of the terms for which they were elected, they shall draw lots for priority of commission, and certify the result to the governor, who shall issue the commissions of said judges on different days, giving the priority of commission to the judge drawing the right to receive the same.

NOTE.—In this clause, the word "general" is omitted before "election" in the first line.

74. COURT TO BE A COURT OF RECORD; PROCEEDINGS NOT TO BE COLLATERALLY ATTACKED.

SECTION 2. The orphans' court of each county, whether separate or otherwise, is hereby declared to be a court of record,

with all the qualities and incidents of a court of record at common law. Its proceedings and decrees, in all matters within its jurisdiction, shall not be reversed or avoided collaterally in any other court; but they shall be liable to reversal, modification or alteration on appeal.

NOTE.—This is Section 2 of the Act of March 29, 1832, P. L. 190, 3 Purd. 3360, altered by inserting in lines 1 and 2 the words "of each county, whether separate or otherwise," and by omitting, at the end, the words "to the supreme court, as hereinafter directed."

75. CALLING IN JUDGES OF OTHER DISTRICTS WHEN JUDGE OF DISTRICT IS UNABLE TO SIT;—POWER TO CALL IN OTHER JUDGE.

SECTION 3. (a) Whenever, by reason of sickness, absence, interest or other cause, a judge of any separate orphans' court, or a judge of the court of common pleas in a judicial district having no separate orphans' court, may be unable to sit in any matter depending in the orphans' court of such district, and there shall be no other judge of the orphans' court or of the court of common pleas of such district available for the purpose, it shall be lawful for said judge to call upon any judge of a separate orphans' court of any other judicial district of this commonwealth, or any judge of the court of common pleas of any other judicial district having no separate orphans' court, to preside in and determine such matter, with the same force and effect as he, the regular commissioned judge of such district, if presiding, might do.

NOTE.—This is Section 1 of the Act of March 4, 1875, P. L. 5, 3 Purd. 3372, modified so as to apply in all cases thus meeting the decision in Livingston's Appeal, 88 Pa. 209, that the Act of 1875 applied only to counties having separate orphans' courts and that a judge of such a court could not be called in to sit in a county having no separate orphans' court, where the orphans' court must be held by a common pleas judge.

The new section is intended to supply not only the Act of 1875, but also, so far as the orphans' court is concerned, Section 8 of the Act of April 4, 1843, P. L. 133, 3 Purd. 3371, extending to the orphans' court and the criminal courts the provisions of Sections 37-41 of the Act of April 14, 1834, P. L. 349, 1 Purd. 632.

76. COMPENSATION AND CARFARE.

(b) Such judge of another judicial district called in as provided by clause (a) of this section shall be entitled to receive

as compensation for so presiding, the sum of twenty dollars a day and carfare, and no more. No payment shall be made for any day consumed in such service of more than expenses and carfare, unless said judge, so assigned, actually presides in open court on such day.

NOTE.—This is modeled upon part of Section 5 of the Act of April 27, 1911, P. L. 101, 5 Purd. 5540, relating to judges of the courts of common pleas.

77. COMMON PLEAS JUDGES SITTING IN SEPARATE ORPHANS' COURT;—POWER TO ACT.

SECTION 4. (a) The judges of the court of common pleas of any judicial district having a separate orphans' court shall, when called upon by the president judge of such separate orphans' court, as hereinafter provided, have power to hear and determine, when certified according to the provisions of clause (b) of this section, all matters, causes and things whatsoever, in such separate orphans' court, so fully and effectually, and to dispose thereof in the same manner, as may be done by the judges of said separate orphans' court sitting therein.

NOTE.—This and the following clauses of this section are copied, with slight changes in phraseology, from Sections 1 to 4 of the Act of April 21, 1915, P. L. 156, 5 Purd. 5541. Section 5 is a general repealer. In clause (d) the provision as to mileage and expenses has been added to conform to the Act of 1913, Section 5 (d), *infra*. (See 84 *infra*.)

The Act of 1915 is recommended for repeal.

78. JUDGES NOT COMPELLED TO ACT.

(b) Nothing in this section shall be construed to make it compulsory upon the judges of said court of common pleas to render the services aforesaid; but whenever the proper despatch of business requires it, and an arrangement can be made with a judge of such court of common pleas for such service, the president judge of the separate orphans' court of the said district may certify all matters to be heard and determined by such judge of the court of common pleas, specially presiding as aforesaid.

79. WHEN PRESIDENT JUDGE ABSENT OR DISABLED OTHER JUDGE MAY CALL IN COMMON PLEAS JUDGE.

(c) In judicial districts having more than one judge of the separate orphans' court, whenever the president judge of such

court shall be absent from the district or disabled by sickness, and occasion shall occur, it shall be competent for the judge next oldest in commission, being then in the district and able to act, to arrange for the services herein provided for, and to make the necessary certificates in like manner and to the same intent, effect, and purpose as the same could be done by the said president judge.

NOTE.—The words "and able to act" have been inserted.

80. MILEAGE AND EXPENSES.

(d) No additional compensation shall be received by said judges of the court of common pleas for any service rendered in pursuance of this section; but they shall be entitled to be paid such mileage and other actual expenses as are provided by law for judges of this commonwealth when holding court outside of the district for which they shall have been commissioned.

81. ORPHANS' COURT JUDGES SITTING IN COURTS OF COMMON PLEAS OR CRIMINAL COURTS;—POWER TO ACT.

SECTION 5. (a) In addition to the powers now possessed and exercised by the judges of the separate orphans' courts of this commonwealth, said judges shall, when called upon by the president judge of the court of common pleas of the same judicial district, as hereinafter provided, have power to hear and determine, when certified according to the provisions of clause (b) of this section, all pleas, actions, causes, civil or criminal issues, and all issues and other matters in equity, in the court of common pleas, court of oyer and terminer and general jail delivery, and court of quarter sessions of the peace, for said judicial district, so fully and effectually, and to dispose thereof in the same manner, as may be done by the judges of the court of common pleas sitting in said courts.

NOTE.—This and the following clauses of the present section are copied, with slight changes in phraseology, from Sections 1 to 4 of the Act of July 19, 1913, P. L. 844, 6 Purd. 7036. Section 5 is a general repealer.

The provisions of the Act of April 18, 1905, P. L. 208, 6 Purd. 7035, which related only to equity proceedings, are incorporated by the insertion of the words "and all issues and other matters in equity."

Both acts are recommended for repeal.

82. JUDGES NOT COMPELLED TO ACT.

(b) Nothing in this section shall be construed to make it compulsory upon the judges of said orphans' court to render the services aforesaid; but whenever the proper despatch of business requires it, and an arrangement can be made with a judge of such orphans' court for such service, the president judge of the court of common pleas of the same judicial district may certify all matters or issues to be heard and determined by such orphans' court judge, specially presiding as aforesaid.

83. WHEN PRESIDENT JUDGE ABSENT OR DISABLED OTHER JUDGES MAY CALL IN ORPHANS' COURT JUDGE.

(c) In districts having one or more additional law judges, whenever the president judge shall be absent from the district, or disabled by sickness, and occasion shall occur, it shall be competent for the additional law judge, and in districts having more than one additional law judge, for the one oldest in commission, being then in the district and able to act, to arrange for the service herein provided for, and to make the necessary certificates in like manner, and to the same intent, effect and purpose, as the same could be done by the said president judge.

NOTE.—In this clause, "shall" has been substituted for "should" in line 4, and "one" for "an" before "additional law judge" in line 5. The words "and able to act" have been inserted.

84. MILEAGE AND EXPENSES.

(d) No additional compensation shall be received by the said orphans' court judges for any service rendered in pursuance of this section; but they shall be entitled to be paid such mileage and other actual expenses as are provided by law for judges of this commonwealth when holding court outside of the district for which they shall have been commissioned.

85. SEAL OF COURT.

SECTION 6. Every orphans' court shall have a seal for the use of the said court, having engraved thereon the same device as is engraved on the great seal of the State, together with the name of the respective court; and such seal may be renewed,

under the direction of such court, as often as occasion shall require.

NOTE.—This is a combination of Section 55 of the Act of April 14, 1834, P. L. 351, 3 Purd. 3361, which, however, provides that the seal shall have engraved upon it "such words and devices as are inscribed on the seal now in use in the respective court," and Section 1 of the Act of March 6, 1854, P. L. 156, 3 Purd. 3338. Both sections are recommended for repeal, the latter only so far as it relates to the orphans' court.

86. COURT ROOMS.

SECTION 7. That commissioners of the several counties where-in separate orphans' courts are now or hereafter shall be established shall provide proper and suitable apartments, as may be required by said courts, in which the business of said courts shall be held and conducted, and in which the records thereof shall be safely and securely kept.

NOTE.—This is Section 10 of the Act of May 19, 1874, P. L. 207, 3 Purd. 3362, modified by inserting the words, "as may be required by said courts."

87. CLERK OF COURT,—REGISTER OF WILLS TO BE CLERK IN COUNTIES HAVING SEPARATE ORPHANS' COURT; OTHER COUNTIES.

SECTION 8 (a) The register of wills of each county in which a separate orphans' court is now or hereafter shall be established shall be clerk of such court and subject to its directions in all matters pertaining to his office; and he may appoint an assistant clerk or clerks, but only with the consent and approval of said court.

In each county having no separate orphans' court, a clerk of the orphans' court shall be elected and commissioned in accordance with the existing law.

NOTE.—This is copied from the first part of the Act of March 31, 1915, P. L. 41, 6 Purd. 7034, relating to counties having more than 150,000 inhabitants, and the Act of April 25, 1889, P. L. 52, 3 Purd. 3362, relating to counties having less than that population.

The other parts of those acts relate to salaries and fees—subjects which have been excluded from the present draft, and it is not recommended that said acts be repealed.

The last sentence has been added because the Commissioners considered it inadvisable in the present draft to attempt to deal with the local provisions of the Act of July 2, 1839, P. L. 559, 3 Purd. 3664 and its amendments.

**88. DUTIES OF CLERK,—CUSTODY OF RECORDS;
DUTIES IN GENERAL.**

(b) 1. In each county of this commonwealth, the clerk of the orphans' court shall have the custody of the records and of the seal of the respective court, and keep the same at the place of holding such court, and in the apartments provided by law for that purpose; and he shall faithfully perform, under the direction of the court, all the duties appertaining to his office.

NOTE.—This is founded on Section 56 of the Act of April 14, 1834, P. L. 351, 3 Purd. 3361. The first part of that section, reading, "A clerk shall be commissioned for each of the said courts," is sufficiently covered by clause (a) supra.

**89. DOCKETS; RECORDS OF ACCOUNTS AND AU-
DITOR'S REPORTS.**

2. Said clerks are hereby authorized and required to keep, in dockets provided for the purpose, a full record of all proceedings of their respective courts, and place upon record, in a fair, legible hand, or in typewriting, in a book or books to be provided for that purpose, all accounts of executors, administrators, guardians and trustees, as well as all reports of auditors appointed by said courts, respectively, omitting the testimony and documents accompanying the same; the fees for this service to be one-half of the amount now allowed by law for the recording of deeds.

NOTE.—This is Section 18 of the Act of April 25, 1850, P. L. 572, 1 Purd. 1126, with the addition of the provision as to dockets, and of the words "trustees" and "or in typewriting."

**90. TRANSLATIONS OF PAPERS IN OTHER THAN
ENGLISH LANGUAGE.**

3. Any person who shall offer any written or printed instrument to be filed in any orphans' court or in the office of the clerk of any orphans' court, which instrument shall be in any other than the English language, shall furnish at his own expense, to the clerk of such court, a sworn translation in English of such instrument thus offered, and the clerk shall attach or cause to be attached such translation to the original and file both the original and the translation of record in his office in all cases where filing is now or hereafter may be required by law, but in all cases where recording is now, or hereafter may be, required, both the original and the translation in English shall be recorded. Such clerk shall

not file or mark filed, record or mark recorded, any written or printed instrument in violation of this clause, nor shall any paper filed or recorded in violation of this clause be notice to any person in any legal proceeding whatever, nor be received or considered in evidence in any proceeding at law or in equity.

NOTE.—This is founded on Sections 1 and 2 of the Act of May 31, 1893, P. L. 188, 4 Purd. 4052-3, which relates to the register and recorder and to all courts of record.

91. BILL OF COSTS.

(c) The separate orphans' courts of this commonwealth may establish a bill of costs to be chargeable to parties and the estates before them for settlement, for the services of the clerks of said courts, respectively, in the transaction of business of said courts. In counties wherein no separate orphans' courts have been or shall be established, the law as to fees to be charged by clerks of the orphans' courts shall remain as heretofore.

NOTE.—The first sentence is the last part of Section 1 of the Act of March 18, 1875, P. L. 29, 3 Purd. 3370, with the substitution of "may" for "shall."

The second sentence has been added because the Commissioners considered it inadvisable to disturb the existing system. See 2 Purd. 1630.

92. JURISDICTION.

SECTION 9. The jurisdiction of the several orphans' courts, whether separate or otherwise, shall extend to and embrace:

93. GUARDIANS.

(a) The appointment, control, removal and discharge of the guardians of minors, and the settlement of their accounts:

NOTE.—This and most of the following clauses of this section are founded upon Section 19 of the Act of June 16, 1836, P. L. 792, 3 Purd. 3362-9. The changes and additions are noted under the particular clauses.

Section 19 of the Act of 1836 supplied Section 4 of the Act of March 29, 1832, P. L. 190, and enlarged the jurisdiction there given.

In the present clause, the provisions of Section 6 of the Act of May 19, 1874, P. L. 207, 3 Purd. 3369, have been incorporated, omitting, however, the reference to "registers' courts."

94. TRUSTEES.

(b) The appointment of trustees for any persons interested in the real or personal estate of any decedent, and the control, re-

moval, discharge and settlement of the accounts of trustees so appointed and of testamentary trustees, whether the testamentary trustees be appointed *nominatim* or *virtute officii* :

NOTE.—This clause is new, but is declaratory of the existing law.

95. TRUSTEES DURANTE ABSENTIA.

(c) The appointment of trustees for absent persons, the control, removal and discharge of trustees so appointed, and the settlement of their accounts :

NOTE.—This clause is new, and is introduced to cover the jurisdiction under the Act of April 11, 1879, P. L. 21, 4 Purd. 4904, which is the basis of Section 60 of the Fiduciaries Act. (See 617 *infra*.)

96. EXECUTORS AND ADMINISTRATORS.

(d) The control, removal and discharge of executors and administrators, deriving their authority from the register of the respective county, and the settlement of their accounts :

97. DISTRIBUTION OF DECEDENTS' ESTATES.

(e) The distribution of the assets and surplusage of the estates of decedents among creditors and others interested :

98. SALE OF REAL ESTATE FOR PAYMENTS OF DEBTS OF DECEDENT.

(f) The sale of real estate of decedents for payment of their debts.

NOTE.—This is an amendment of Clause IV of Section 19 of the Act of June 16, 1836, 3 Purd. 3366, which reads "The sale of real estates of decedents." Other sales than those for payment of debt are covered by clauses (g) and (h).

99. DISPOSITION OF TITLE TO REAL ESTATE TO RENDER THE SAME FREELY ALIENABLE, ETC.

(g) The disposition of the title to real estate of decedents and of persons disabled from dealing therewith in order to render the same freely alienable and productive to the living owners thereof :

NOTE.—This is a new clause, introduced to cover the provisions of the Price Act.

100. PARTITION.

(h) The partition of the real estate of decedents among the parties entitled thereto, the valuation of such real estate, and the sale thereof for the purpose of distribution:

NOTE.—This is an amendment of Clause V of Section 19 of the Act of 1836, which reads: "The partition of the real estates of intestates among the heirs."

101. SPECIFIC EXECUTION OF DECEDENTS' CONTRACTS AS TO REAL ESTATE.

(i) The specific execution of contracts made by decedents to sell and convey any real estate of which such decedent shall die seized, and of contracts made by decedents to purchase any real estate:

NOTE.—This is Clause VI of Section 19 of the Act of 1836, amended so as to include contracts for the purchase of real estate.

A court of equity has no jurisdiction to enforce specific performance of a contract made by a decedent for the sale of land of which he died seized.

Jurisdiction in such a case is vested in the orphans' court by Section 9 (i) of the Orphans' Court Act of June 7, 1917, P. L. 372; and Section 18 of the Fiduciaries Act of June 7, 1917, P. L. 486, providing the mode of procedure by petition to the orphans' court also makes that remedy exclusive.

The orphans' court formerly had the same exclusive jurisdiction under the Act of April 28, P. L. 157.

"Passing to the demurrer itself, we note that by Section 9 (i) of the Orphans' Court Act of June 7, 1917, P. L. 372, jurisdiction of that court is given to 'embrace'—

"The specific performance of contracts made by decedents to sell and convey any real estate of which such decedents shall die seized,' and the proceedings therefor by petition to said court by the Fiduciaries Act of 1917, Section 18 (a) P. L. 486, 'such court shall have power if the facts be sufficient in equity, no sufficient cause being shown to the contrary—to decree specific performance of such contract according to the true intent and meaning thereof.'

"By the jurisdiction of and proceedings in the orphans' court under the Orphans' Court and Fiduciaries Acts of 1917 cited above, all controverted questions raised by the bill at bar are judiciable. Therefore, the adequate remedy thus exists and its legislative exclusiveness of resort precludes any other because of any claimed greater convenience." Smith, P. J. in *Wykoff v. Manzer*, 22 Lack. 308.

Where decedent, in his lifetime, in a written lease gave the petitioner the privilege of purchasing the leased premises at any time within one year from the date of the lease, and died during a renewed and extended

period of such agreement to sell, a demurrer to a petition by the said vendee was overruled the court holding that the Act of 1917 does not change the remedy provided by the Act of February 24, 1834, (P. L. 70) as superseded by the Act of April 28, 1899, (P. L. 157). *Owen's Estate*, 28 Dist. 667.

102. LEGACIES.

(j) Proceedings for the collection or enforcement of payment or delivery of all legacies, whether pecuniary, specific or otherwise, and whether charged on real estate or not:

NOTE.—This is Clause VII of Section 19 of the Act of 1836, extended so as to cover specific legacies and legacies charged on land.

This jurisdiction is exclusively in the orphans' court, and the parties cannot, by agreement, in the form of a case stated, raise an issue in the common pleas, confer jurisdiction on the latter court to determine who is entitled to a legacy under the will of a decedent. *Stapler v. Atkinson*, 27 Dist. 995.

103. DISCHARGE OF LIENS AND CHARGES.

(k) Proceedings for the discharge of real estate of decedents from the lien of debts of decedents, and for the discharge of real and personal estate from the liens of legacies, annuities, dower, recognizances and other charges.

NOTE.—This is a new clause, added to cover branches of jurisdiction under the new Fiduciaries Act.

104. WHERE FIDUCIARIES ARE POSSESSED OF OR ACCOUNTABLE FOR ESTATE OF DECEDENT.

(l) All cases within their respective counties, wherein executors, administrators, guardians or trustees may be possessed of or are in any way accountable for any real or personal estate of a decedent.

NOTE.—This is Clause VIII of Section 19 of the Acts of 1836.

Under this section it was held that the orphans' court had jurisdiction to order the issue of a new certificate of stock, in accordance with Section 17, of the Uniform Stock Transfer Act of May 5, 1911, (P. L. 126) where the fiduciary, in this case an executor, accountable to that court, showed title to the stock in the fiduciary estate, the loss or destruction of the certificate and the impossibility of making a complete distribution of the assets of the estate for lack of a muniment of title. The court per Henderson, J., said: "What are the controlling principles in this matter? We have a fiduciary accountable to this court; an asset the title to which

is in the fiducial estate; not even a color of dispute as to the title and the impossibility of making a complete distribution of the assets of this estate for lack of a muniment of title; hence we conclude that this court has jurisdiction." *Hagerman's Estate*, 47 Pa. C. C. 498; 28 Dist. 384.

The orphans' court, however, has no jurisdiction to determine disputed questions of title. While it cannot be doubted that under this section, as under the former Act, the orphans' court has jurisdiction over all of the property of an estate and can compel the appearance by citation of those persons who have possession of any part thereof, since such persons are constructive trustees and accountable therefor and may be compelled to appear on citation to deliver the trust property to the executor, yet this principle is applicable only where there is no contest as to the title to the property. *Wyant's Estate*, 33 York 208.

105. APPEALS AND PROCEEDINGS CERTIFIED FROM REGISTERS OF WILLS.

(m) All appeals from the orders or decrees of the register of wills of their respective counties, and all proceedings removed from said registers by certification.

NOTE.—This clause is declaratory of the existing law.

106. INCIDENTAL AND ADDITIONAL POWERS.

(n) The exercise of all other powers needful to the doing of anything which is or may be hereafter required or permitted to be done in said court, whether incidental to the powers hereinbefore enumerated or in addition thereto.

And such jurisdiction shall be exercised under the limitations, and in the manner provided by law.

NOTE.—The first sentence of the clause is new, and is intended to remove any doubt as to the interpretation of this section when compared with the language of the other acts relating to the specific branches of the jurisdiction, and to obviate the necessity of amending this section in case of any future grant of new jurisdiction to the court.

The second sentence is the conclusion of Section 19 of the Act of 1836.

107. RULES OF COURT.

SECTION 10. The several orphans' courts shall have full power and authority to make, from time to time, such rules for regulating the practice thereof, respectively, and for expediting the determination of suits, causes and proceedings therein, as in their discretion they shall judge necessary or proper for the exercise of the powers hereby conferred or which may hereafter be conferred: *Provided*, That such rules shall not be inconsistent with the constitution and laws of this commonwealth.

NOTE.—This is a combination of part of Section 58 of the Act of March 29, 1832, P. L. 213, Section 21 of the Act of June 16, 1836, P. L. 792, and Section 9 of the Act of May 19, 1874, P. L. 207, all of which appear in 3 Purd. 3370.

Under this section it has been held that the orphans' court has authority to make, *inter alia*, the matter of filing accounts the subject of a rule of court. Gummey, J., in *Hayden's Estate*, 28 Dist. 39.

108. TIME OF HOLDING COURT.

SECTION 11. The orphans' courts of every county of this commonwealth shall be held during every term of the court of common pleas of the respective county and at such other times and as often as the judges thereof shall think necessary or proper.

NOTE.—This is intended to take the place of Section 57 of the Act of April 14, 1834, P. L. 352, 3 Purd. 3361, which reads as follows:—

"The orphans' courts of the city and county of Philadelphia shall be held during every term of the court of common pleas of the said city and county, at such times and as often as the judges thereof shall think necessary or proper; and the orphans' court of every other county of this commonwealth shall be held during the first week of each term of the court of common pleas of the respective county, and at such other times as the judges thereof shall think necessary or proper."

Section 4 of the Act of May 19, 1874, P. L. 207, 3 Purd. 3361, provides that, in Philadelphia, Allegheny and Luzerne Counties, the orphans' courts shall be held during every term of the courts of common pleas and at such other times and as often as the judges shall think necessary or proper.

109. NOTICE TO PARTIES.—IN GENERAL.

SECTION 12. (a) In all cases in which heirs, legatees or distributees are interested, and in consequence of such interest, notice shall be required to be given to them or any of them, of any proceedings in the orphans' court, such notice shall, except in the case of the accounts of executors or administrators, and in other cases specially provided for, be given in such manner, personally, by registered mail, or by publication, as shall appear to the court to be reasonable and proper, according to general rules adopted by the court, or special orders made by the court in particular cases.

NOTE.—This is founded on Section 52 of the Act of March 29, 1832, P. L. 207, 3 Purd. 3372, which, however, contains the following provisions as to the method of giving notice: "To all persons resident within the county in which the court has jurisdiction, notice shall be given personally, or by writing left at their place of abode; to all persons resident without

the county, personal notice as aforesaid shall be given, if in the opinion of the court such notice be reasonably practicable; if otherwise, by publication in such one or more newspapers as, in the opinion of the court, will be most likely to meet the eye of those entitled to notice."

The change has been made in pursuance of the general view of the Commissioners that, except in cases of sales of real estate, the details as to the method of giving notice should be regulated by general rule of court or special order, rather than by inflexible statutory provisions.

Section 53 of the Act of March 29, 1832, 3 Purd. 3372, relating to the method of giving notices where minors are interested, is embodied, with changes, in Section 59 (k) of the new Fiduciaries Act, (see 616 *infra*).

110. PUBLICATION.

(b) The judges of the respective orphans' courts shall have power, and are hereby authorized to make such rules and regulations as they may deem proper for the publication of advertisements of notices to parties in all cases within their jurisdiction. *Provided*, That said court shall have supervision of and regulate the cost of such publication in all cases, as well by special order in particular cases, as by general rules.

NOTE.—This is part of Section 1 of the Act of March 18, 1875, P. L. 29, 3 Purd. 3370. The section also contains provisions as to notices of audits, of sales of real estate, and in partition proceedings, which are covered in their appropriate places in the proposed new acts, and a provision for the establishment of a fee bill, which is covered in Section 8 (c) of the present draft. (See 91 *supra*.)

111. ATTESTATION OF PROCESS, ETC.

SECTION 13. All process, subpoenas, certificates, copies of records and other documents, which shall be issued out of any of said courts, shall be attested in the name of the president judge thereof alone.

NOTE.—This is Section 5 of the Act of May 24, 1878, P. L. 132, 3 Purd. 3370.

112. RETURN-DAYS OF PROCESS.

SECTION 14. The several orphans' courts shall have power to fix the return-days of all process issuing out of the respective courts, whenever such return-days are not otherwise provided for by law.

NOTE.—This is part of Section 58 of the Act of March 29, 1832, P. L. 213, 3 Purd. 3370, which was new in that act.

113. PROCEEDINGS IN VACATION.

SECTION 15. The several orphans' courts of this commonwealth shall have full power in vacation to administer the business of the court and to issue process; *Provided*, That said process shall be made returnable only in the county where the proceeding is pending.

NOTE.—This is founded on Section 1 of the Act of May 7, 1889, P. L. 102, 3 Purd. 3371, which applies to "the law judges of the several courts of the commonwealth." "Administer the business of the court and issue process" has been substituted for "grant citations and rules to show cause," etc. In the proviso, the words "at a term of court" have been omitted after "returnable."

Under the authority of this section, the court may grant in chambers a petition for leave to pay a legacy of \$100 to the father of a minor as its natural guardian. *Storer's Estate*, 28 Dist. 215.

114. INJUNCTIONS.

SECTION 16. The said courts shall have power to prevent, by orders in the nature of writs of injunction, acts contrary to law or equity, prejudicial to property over which they shall have jurisdiction: *Provided*, That security may be required as in other cases of writs of injunction.

NOTE.—This is Section 7 of the Act of May 19, 1874, P. L. 207, 3 Purd. 3370, except that the proviso to that section reads: "That security shall be given, as is now required by law in cases of writs of injunction."

115. PROCEEDINGS TO OBTAIN APPEARANCE; CITATIONS, PROCEDURE IN DEFAULT OF APPEARANCE.

SECTION 17. The manner of proceeding in the orphans' court, to obtain the appearance of a person amenable to its jurisdiction, and the procedure in default of appearance, shall be as follows:

116. AWARDING CITATION.

(a) On petition to the court of any person interested, whether such interest be immediate or remote, setting forth facts necessary to give the court jurisdiction, the specific cause of complaint, and the relief desired, and supported by oath or affirmation, the orphans' court, or any judge thereof, may award a citation returnable at a day certain, not less than ten days after the issuing thereof.

NOTE.—This and the following clauses of this section, except where otherwise indicated in the notes, are founded on Section 57 of the Act of March 29, 1832, P. L. 207, 3 Purd. 3372-77.

In the present clause, the words "in vacation" are omitted after "judge thereof."

See forms 27, 57.

One who is simply a surety for the administrator of an estate cannot be said to be interested in the estate of which his principal is the administrator, although the administrator fails to account for and pay the trust property and funds which came into his hands and thereby the surety becomes a debtor of the estate, and therefore under the above section such surety has no standing to require his principal, who is the administrator, to pay adjudicated claims. *Seidman's Estate*, 20 Lack. 176, citing *Moore's Estate*, 19 Dist. 109.

117. BY WHOM TO BE SERVED.

(b) Such citation may be served by the party obtaining the same, or by any authorized agent, or, if required by the party, it shall be served by the sheriff or coroner, as the case may require, of the proper county.

118. MANNER OF SERVICE.

(c) The manner of service shall be by giving a copy thereof to the respondent personally, or by leaving such copy with some adult member of his family, at his place of residence.

NOTE.—In this, as in several subsequent clauses, "respondent" has been substituted for "defendant." The word "adult" has been inserted, and "residence" substituted for "abode."

119. PLACE OF SERVICE.

(d) Such service may be made anywhere within this commonwealth; and if such party resides outside the commonwealth and his place of residence is known and the proceeding concerns property situate within the commonwealth, the court may, in its discretion, authorize service to be made on such party personally wherever found, or by registered mail, or may direct notice to be given by publication in such manner as shall appear to the court to be reasonable and proper, according to general rules adopted by the court, or special orders made by the court in particular cases.

NOTE.—This is a new clause, intended to make citations operative throughout the state, and to provide for service outside the state in cases where the court has jurisdiction; *Wallace v. United Electric Company*, 211 Pa. 473; *Coleman's Appeal*, 75 Pa. 441.

120. SERVICE ON SURETIES.

(e) If the respondent be not found, and have no known residence within the county, such citation may be served, in like manner, upon the person or persons who may be the surety or sureties of such party, in any bond or recognizance given by him for the performance of any trust or duty in respect to which such citation may have issued.

NOTE.—This is Clause IV of Section 57 of the Act of March 29, 1832, 3 Purd. 3374, the only changes being to substitute "respondent" for "defendant" in the first line, and "residence" for "dwelling place" in the second line.

The method of service here provided for does not meet the case of a respondent who has given no bond and who resides in or has removed to another state. Such a case is intended to be covered by the last preceding clause.

121. RETURN OF SERVICE.

(f) The return to a citation, if made by the party on whose petition it issued, or his agent as aforesaid, shall be on oath or affirmation; and in all cases of service the return shall state how such citation was served.

122. ALIAS AND PLURIES CITATIONS.

(g) If the party to be cited cannot be found, and has no known residence, and there is no surety on whom service of the citation can be made as aforesaid, and the facts shall be so stated in the return on oath or affirmation, by the party complaining, or by some one competent to make affidavit in that behalf, the orphans' court may award another citation or pluries citations, returnable in like manner with the first.

NOTE.—This is Clause VI of Section 57 of the Act of 1832, except that the words "dwelling place within this commonwealth" are omitted and "residence" substituted, the case of a party having a known residence outside the state having been covered by clause (d) of this section, and that the words "or pluries citations" have been inserted.

123. ORDER OF PUBLICATION ON AWARD OF ALIAS OR PLURIES CITATIONS.

(h) At the time of awarding such second or further citation, the court may make an order for publication of the same, in such place or places, and for such length of time, as the court, having regard to the supposed place of residence of the respondent, and other circumstances, shall direct.

NOTE.—This is Clause VII of Section 57 of the Act of 1832, inserting "or further" in line 1, omitting, after "the same," the words "in two or more newspapers, to be designated by the court," and changing "defendant" to "respondent" in line 5.

124. DEFAULT OF APPEARANCE,—POWER OF COURT TO PROCEED.

(i) 1. At the time appointed for the appearance of the respondent, should he not appear, according to the requisition of the citation, and if due proof be made of the service thereof, or, when service cannot be made, of the publication thereof, as hereinbefore prescribed, the court may, with or without another citation, as justice may require, proceed to make such order or decree in respect to the subject matter as may be just and necessary.

125. METHOD OF PROCEEDING.

2. It shall be lawful for the court, on such proof, to order that the petition of the complainant be taken as confessed, and, in cases where there is personal service, to grant relief according to the prayer thereof. When there is no personal service the court shall, and when there is personal service the court may, in its discretion, hear testimony in support of the allegations of the petition, or direct a reference to a master or auditor to take proof of the facts and circumstances set forth in the petition, and to report thereon; and also to report an account against such respondent, if necessary. On the report of such master or auditor, the court shall make such order or decree as may be just and necessary.

NOTE.—This is a combination of clauses IX and X of Section 57 of the Act of 1832, 3 Purd. 3374-5, modified so as to make it discretionary with the court to enter a decree without testimony, to hear testimony itself, or to appoint a master. Clause IX as it now stands provides only for the appointment of an auditor.

Under the existing law, such a decree cannot be entered, even where there is personal service, without hearing witnesses: Shilling's Appeal, 1 Pa. 90.

126. PROCEEDINGS TO COMPEL OBEDIENCE TO ORDERS AND DECREES.

SECTION 18. (a) Compliance with an order or decree of the court may be enforced:

127. ATTACHMENT OF THE PERSON.**1. By attachment of the person.**

NOTE.—This and Clauses 2 and 3 are derived from Clause XI of Section 57 of the Act of 1832, with the addition of the words “of the person” after “attachment,” and “of real or personal property” after “sequestration,” and the omission, at the end, of the words “in vacation.”

Section 8 of the Act of March 27, 1713, 1 Sm. L. 84, 3 Purd. 3375, which has been held to be still in force: *Ex parte Batdorf*, 13 W. N. C. 417, provides: “If any person or persons, being duly summoned to appear in any of the said orphans’ courts, ten days before the time appointed for their appearance, shall make default, the justices may send their attachments for contempts, and may force obedience to their warrants, sentences and orders, concerning any matter or thing cognizable in the same courts, by imprisonment of body, or sequestration of land or goods, as fully as any court of equity may or can do.”

It is recommended that this section be repealed as covered by the present clause.

128. SEQUESTRATION.**2. By sequestration of real or personal property.****129. FIERI FACIAS.**

3. In case of a decree for the payment of money, against a party who has appeared, the complainant may have a writ of execution in the nature of a writ of fieri facias against personal property only, which writ may be allowed by the court, or by any judge thereof.

NOTE.—This clause has been modified by inserting the words “against personal property only.” See the note to paragraph 5, *infra*.

130. ATTACHMENT EXECUTION.

4. Whenever any person against whom a decree for the payment of money has been made by any orphans’ court is possessed of or entitled to any stock, deposits or debts due him, or to any legacy or interest in the estate of a decedent, the same may be levied on or attached in satisfaction of such decree, by the same process and in the same manner as is now or may hereafter be provided by law in the case of judgments of any court of common pleas. A writ of attachment for said purpose may be allowed by said orphans’ court, or any judge thereof, as writs of fieri facias in said court are allowed, and may be served out of the county in which the same may be issued; but service on the party against whom such decree was made shall not be required, if he be not found in said county.

NOTE.—This is founded on Section 1 of the Act of March 27, 1873, P. L. 49, 3 Purd. 3378. That section refers to the Acts of June 16, 1836, P. L. 767 (see 32-8) and April 13, 1843, P. L. 235, Section 10. As such a reference cannot constitutionally be made in the present act, it is recommended that the Act of 1873 be not repealed.

131. TESTATUM FIERI FA.

5. Writs of testatum fieri facias may be issued out of any orphans' court, in the same manner that writs of execution in the nature of writs of fieri facias are allowed by this act; and the sheriff, or other officer to whom any such writ is directed, shall proceed to levy and sell the personal property of the person or persons against whom the same shall be issued, in the same manner in all respects, as if such writ had issued out of a court of common pleas.

NOTE.—This is part of Section 2 of the Act of April 21, 1846, P. L. 430, 3 Purd. 3377, eliminating all references to the writ of vend. ex. and to real property, pursuant to the conclusion of the Commissioners that executions against real property should issue from the common pleas only. See paragraph 3, *supra*, cause (e) *infra*, and Section 51 of the Fiduciaries' Act. This, it seems to the Commissioners, is the logical and convenient arrangement, since, as pointed out in Weyand's Appeal, 62 Pa. 198, 202, a decree of the orphans' court is, of itself, no lien on real estate, and it is anomalous that a vend. ex. should issue on a judgment which has no lien.

Under Section 51 of the Fiduciaries' Act (see 561-2 *infra*) and under clause (e) of the present section, a lien on real estate may be acquired by filing a transcript in the common pleas, where the judgment will be indexed, a matter for which there is no provision in the orphans' court; and it is proper that the execution against real estate should issue from the court where the lien is acquired. In line 3, "allowed by this Act" is substituted for "allowed by the 57th section" of the Act of 1832. The remainder of that section validated prior proceedings.

132. PROCEDURE ON ATTACHMENT OR SEQUESTRATION,—DIRECTION OF WRITS.

(b) 1. Writs of attachment of the person and sequestration shall be directed to and executed by the sheriff or coroner, as the case may require, of the proper county.

NOTE.—This and the following paragraphs of this clause, except where otherwise indicated, are copied from the clauses of Section 57 of the Act of 1832.

133. ISSUANCE OF PROCESS TO OTHER COUNTIES.

2. When any executor, administrator, guardian or trustee shall reside or move out of the county in which his appointment shall

have taken place, or shall not possess real or personal estate in such county, sufficient to satisfy any decree or order of the orphans' court of such county, it shall be lawful for the orphans' court of such county to issue process to the county in which such executor, administrator, guardian or trustee may be, or in which he may have any real or personal estate, amenable to such process; and such process shall be executed by the sheriff or coroner, as the case may require, of the county in which such executor, administrator, guardian or trustee may be, or may possess real or personal estate as aforesaid.

NOTE.—This is Clause XXV of Section 57 of the Act of 1832, extended so as to include trustees.

134. FORM OF WRIT OF SEQUESTRATION.

3. Writs of sequestration shall be in the following form:

The Commonwealth of Pennsylvania: To the sheriff of the County of _____, greeting: Whereas, A. B. (here set out the decree, or so much thereof as is material to explain the duty to be performed). Therefore we command you, that you do, at proper and convenient hours in the day-time, go to and enter upon all the messuages, lands, tenements and real estates of the said A. B., and that you do collect, take and get into your hands, not only the rents, issues and profits of all his said real estates, but also all his goods, chattels and personal estate and detain and keep the same under sequestration in your hands; and also that you attach all stocks held by him in incorporated companies, and keep the same under attachment, until our said orphans' court shall make other order to the contrary; and you are to return with this writ an inventory or schedule of the property you have sequestered or attached, and a certificate under your hand of the manner in which you shall have executed this writ, to our said court, on the _____ day of _____ next. Witness, etc.

135. SEQUESTRATION NOT TO ABATE ON DEATH OF PARTY.

4. A sequestration shall not abate by the death of the complainant or respondent.

136. FILING COPY OF WRIT OF SEQUESTRATION IN PROTHONOTARY'S OFFICE.

5. It shall be the duty of the sheriff or the coroner, as the case may be, immediately after receiving any such writ of sequestra-

tion, to file a copy thereof in the office of the prothonotary of the court of common pleas of the same county, who shall, forthwith, enter the substance thereof on his docket, with the names of the parties, and index the same in the judgment index; and the entry thereof shall thenceforward operate to charge the real estate of the respondent, according to the form and effect of such writ, and shall bind the same in the hands of all purchasers and mortgagees, subsequently to such entry, without other notice: *Provided*, That if such sequestration shall be dissolved by the order of the orphans' court, the respondent, or any person interested in such real estate, may have a certificate of the same from the clerk of the said court, which it shall be the duty of such clerk to furnish, on application, and which, being entered on the docket of said court of common pleas, shall have the effect of a satisfaction of such lien.

NOTE.—This is Clause XV of Section 57 of the Act of 1832, altered by substituting "respondent" for "defendant," by inserting in the next to the last line the words "of said Court of Common Pleas," and by adding the provision for indexing in the judgment index.

137. ISSUANCE OF ATTACHMENT OR SEQUESTRATION WHERE PARTY ABSCONDS.

6. When proof shall be made, on oath or affirmation, to the satisfaction of the court, or to any judge thereof, at the time of filing the petition as aforesaid, that the respondent has absconded or is about to abscond or depart from his usual place of abode, to the prejudice of the complainant, it shall be lawful for the court, or for such judge, to allow the issuing of a writ of attachment of the person, or a writ of sequestration, or both, in the first instance, against such respondent; and on the return thereof, the like proceedings may be had, as are authorized on the return of a citation.

NOTE.—This is Clause XVII of Section 57 of the Act of 1832. The following changes have been made: In line 2, the words "if in session" have been omitted after "court," and "in vacation" after "thereof." In line 4 and line 9 "respondent" has been substituted for "defendant."

138. DISSOLUTION OF ATTACHMENT OR SEQUESTRATION.

7. If such attachment of the person or sequestration issued in the first instance be executed, the court, or any judge thereof, may dissolve the same, on the respondent giving security to the satisfaction of the court, or of such judge, to appear on a day

certain to answer to the petition, and to abide the orders and decrees of the court in the premises.

NOTE.—This is Clause XVIII of Section 57 of the Act of 1832, omitting “in vacation” in line 2, and changing “defendant” to “respondent” in line 3.

139. DISCHARGE OF PERSONS ATTACHED AS FOR CONTEMPT.

8. Any person attached as for contempt in refusing to obey an order or decree of the orphans' court, whether for the payment of money or in any other case, may be discharged from custody by said court on his complying with the order or decree of the court, or paying the money for which such order or decree has been made, or upon his purging himself of contempt to the satisfaction of the court by whose order he was attached.

NOTE.—This is a new clause, introduced to make it plain that such discharge may be made by the orphans' court, and that the respondent need not resort to insolvency proceedings in the court of common pleas. There is a conflict of authority on the question under the existing law. See *Baker's Estate*, 21 D. R. 177; *Ex parte Batdorf*, 13 W. N. C. 417.

140. PROCEDURE WHERE PARTY IS WASTING TRUST PROPERTY, OR IS ABOUT TO ABSCOND.

9. When proof shall be made, on oath or affirmation, to the satisfaction of the court, or of any judge thereof, at the time of presenting a petition, or at any stage of the cause, that the party therein named has in his possession trust property or effects, which he is wasting or otherwise disposing of contrary to his duty and the trust, or that he is about to abscond and to carry such trust property or effects out of the jurisdiction of the court, it shall be lawful for the court, or such judge, to award a writ, in the name of the commonwealth, to the sheriff or coroner, as the case may require, of the proper county, returnable on a day certain, commanding him to take possession of all such trust property and effects specified in such writ, and to hold the same subject to the order of the court, and also to attach all debts due to such trust, whether by bond, mortgage or otherwise, and all stocks in incorporated companies, and serve a copy of such writ upon each debtor, and upon each company in which stock may be held belonging to the trust as aforesaid: *Provided*, That before the execution of such writ, the sheriff or coroner, as

the case may be, may require of the party at whose instance such writ may have been issued, sufficient security to indemnify him against any damages arising from the execution thereof: *And provided also*, That if the party against whom such writ may issue shall give sufficient security to such sheriff or coroner, that the trust property or effects specified in such writ shall be forthcoming at the return thereof, then such sheriff or coroner shall not execute the same, but shall make return of the facts to the court.

NOTE.—This is Clause XIX of Section 57 of the Act of 1832. In line 2, the words "in vacation" are omitted as also in line 9. In line 12, after "day certain" the following words are omitted: "to the orphans' court, to be convened for that purpose, if the said court shall not then be in session."

In line 5, and wherever the words "trust property" appear, the comma between the words, which appears in the Act of 1832, is omitted. It did not appear in the original draft of the Act of 1832.

141. ENFORCEMENT OF FINAL ORDER AND DECREE FOR DELIVERY OF TRUST PROPERTY.

10. The like proceedings may be had, where the court has made a final order and decree for the delivery of the trust property and effects by the respondent, to any person who may be designated by law, or by the order of the court, to receive them.

142. ORDER AS TO FINAL DISPOSITION OF TRUST PROPERTY.

11. On the return of such writ, the court may make such order respecting the disposition of such trust property and effects as may be necessary and proper, according to the principles of justice and equity.

NOTE.—This is Clause XXI of Section 57 of the Act of 1832, 3 Purd. 3377, with the substitution of "make" for "take" in the first line.

143. DECREE IN SEQUESTRATION PROCEEDINGS WHEN PARTY DOES NOT APPEAR; SECURITY BY COMPLAINANT.

12. When a decree shall have been made against any party who shall not have appeared according to the requisitions of the citation, and a sequestration shall have issued against the real or personal estate of such party, the court may order the decree

to be satisfied out of the estate and effects sequestered: *Provided*, That such order shall not be carried into execution, until the complainant shall have given security, to the satisfaction of the court, to abide the order of the court, touching the restitution of what he may have received, in case the respondent shall appear, and be admitted to defend the suit; but if such security shall not be given, the estate and effects sequestered, or the proceeds thereof, shall remain subject to the direction of the court, to abide its further order.

144. REOPENING OF SUCH DECREE.

13. If the party, against whom such decree shall have been made, or his representatives, shall, within one year after personal notice of such decree, and within five years after the entry thereof, when no such notice shall have been given, present a petition to the same court, praying to be admitted to be heard, and shall pay such costs as the court shall adjudge, the party so petitioning shall be admitted to a defence, and the case shall then proceed, in like manner as if such party had appeared in due season, and no decree had been made.

145. FAILURE OF RESPONDENT TO APPLY FOR REOPENING.

14. If such party, or his representatives, shall not, within such period, present a petition as aforesaid, the court may make such final order and decree, both in respect to any estate or effects that may have been sequestered and in respect to the matters in controversy in the case, as may be according to justice and equity; and may, if necessary, award a writ in the nature of a *fieri facias*, in the manner hereinbefore provided, as in the case where the party appears.

146. PROCESS TO RECOVER FINES, FORFEITURES AND AMERCEMENTS.

(c) Each of the orphans' courts shall have power to award process, to levy and recover such fines, forfeitures and amercements as shall be imposed, taxed or adjudged by them respectively.

NOTE.—This is Section 20 of the Act of June 16, 1836, P. L. 792, 3 Purd. 3370, limited to the orphans' court.

147. DIRECTION OF, AND PROCEDURE ON, WRITS OF FI. FA.

(d) Writs of fieri facias shall be directed to, and executed by the sheriff or coroner, as the case may require, of the proper county, and the proceedings thereon shall be the same as on writs of fieri facias against personal property issued by the court of common pleas of the same county.

NOTE.—This is Clause XVI of Section 57 of the Act of 1832, 3 Purd 3376, altered by inserting the words "against personal property."

148. TRANSCRIPTS TO THE COMMON PLEAS OF ORDERS UPON PARTIES, OTHER THAN FIDUCIARIES TO PAY MONEY.—FILING TRANSCRIPTS AND EFFECT THEREOF, EXECUTIONS.

(e) 1. It shall be the duty of the prothonotaries of the courts of common pleas to file and docket, whenever the same shall be furnished by any parties interested, certified transcripts of any definitive orders of the orphans' court of the same or any other county upon parties other than fiduciaries, to pay certain sums of money, which transcripts, so filed, shall constitute judgments, which shall be liens against the real estate of the persons ordered to pay from the time of such entry until payment, distribution or satisfaction. Executions may be issued thereon out of said court of common pleas against the real estate only of such persons, by any party or parties interested, for the recovery of so much as may be due to them respectively. The liens of such judgments shall cease at the expiration of five years from the time of the entry aforesaid, unless revived by scire facias in the manner by law directed in the cases of judgments of the courts of common law.

In case of an appeal from the orphans' court, the judgment shall be for no more than the amount finally decreed by the appellate court to be due; and it shall be the duty of the prothonotary of the common pleas, on such decree of the appellate court being certified to him, to enter on his docket the amount so found due and decreed by the appellate court. If such amount be greater than that decreed by the orphans' court, the judgment for such excess shall take effect only from the time of entering the decree of the appellate court; but if the amount be reduced by the final decree of the appellate court, the pro-

thonotary shall reduce the amount originally entered on his judgment docket and index accordingly; and such final decree, upon appeal, being certified and filed in said court of common pleas, the said term of five years shall be counted from the time of such entry.

NOTE.—This is founded on Section 51 (a) of the Fiduciaries Act (see 561 *infra*) which relates to the certification of balances due by fiduciaries or amounts ordered to be paid by them. The present section is intended to cover the certification of decrees against other persons for the payment of money. It being provided by clause (a) 3 (see 129 *supra*) of the present section that only personal property may be sold under execution from the orphans' court, this clause is necessary in order to provide a method of selling real estate.

The phraseology covers the provisions as to filing transcripts in other counties contained in the Act of June 5, 1885, P. L. 78, 2 Purd. 1426, which is recommended for repeal so far as it relates to orders and decrees of the orphans' court.

149. SATISFACTION AND DISCHARGE OF JUDGMENTS ON TRANSCRIPTS.

2. When the person liable shall have fully paid and discharged the amount of such judgment, the parties who have received payment shall acknowledge satisfaction thereof, on the record of the court of common pleas. In case of neglect or refusal so to do, for the space of thirty days after request in writing and tender of all the costs, the orphans' court, on due proof to them made that the entire amount due from such person, according to the order of the orphans' court, has been fully paid and discharged, may make an order for his release from such recorded judgment, which order, being certified to the court of common pleas, shall be entered on their records and shall operate as a full satisfaction and discharge of such judgment.

NOTE.—This is founded on Section 51 (b) of the Fiduciaries Act (see 562 *infra*).

150. FEES OF SHERIFF; MILEAGE; POSTAGE.

SECTION 19. The fees to be taken by the sheriffs of each county for the services enjoined by this act shall be the same as those allowed for like services; and for executing a writ of sequestration the same fees shall be allowed as upon a writ of foreign attachment, together with reasonable costs and expenses, according to the discretion of the court. On all writs and process sent

from another county, no mileage shall be allowed, except for the distance actually traveled, but an allowance shall be made for the transmission of such writs and process, to the clerk of the court from which they may have issued, at the common rates of postage.

NOTE.—This is Section 60 of the Act of March 29, 1832, P. L. 213, 3 Purd. 3385, except that, in line 3, the word "already" is omitted before "allowed."

151. WITNESSES AND EVIDENCE,—SUBPŒNAS.

SECTION 20. (a) Each of the orphans' courts of this commonwealth is empowered to issue writs of subpœna, under its official seal, into any county of this commonwealth, to summon and bring before the respective court, any person to give testimony in any cause or matter depending before it, under the penalties that are or shall be appointed and allowed in any such case by the laws of this commonwealth.

NOTE.—This is Section 22 of the Act of June 16, 1836, P. L. 793, 3 Purd. 3370, which relates to the other courts as well as the orphans' court.

"Its" and "it" have been substituted for "their" and "them," and "that are or shall be" for "hitherto" after "penalties."

152. METHODS OF TAKING TESTIMONY,—IN GENERAL.

(b) 1. In all proceedings begun by petition, where an issue of fact is raised, it shall be within the discretion of the orphans' court, by general rule or by special order in the case, to provide for the reference of the case to a master to take the testimony and report his findings and his recommendations as to a decree, or to provide for the taking of depositions before a notary public or other official authorized to administer oaths and affirmations, or to provide for the taking of testimony before a judge of said court. The office of examiner in the orphans' court, appointed merely for the purpose of taking testimony, is hereby abolished, except in the cases mentioned in paragraph 3 of this clause, and except in cases where, at the time of the approval of this act, examiners have been appointed and are still in office.

NOTE.—This is a new clause, framed to do away with the taking of testimony before an examiner without power to rule on offers of testimony or to recommend a decree, and to substitute the appointment of a

master or the taking of depositions on rule before any official authorized to administer oaths.

In a proceeding in the orphans' court on petition, answer and replication, the proper practice is to move for the appointment of a master to take the testimony and report his findings of fact to the court unless the parties can agree upon the facts.

Under the Orphans' Court Act of June 7, 1917, Sec. 20 (b) P. L. 363, 380, the court may, in its discretion, authorize the taking of depositions before a notary public, but such discretion will only be exercised in matters of small importance. *DiBattista's Est.*, 30 Dist. 988.

153. DEPOSITIONS OF AGED, INFIRM AND GOING WITNESS; COMMISSIONS AND LETTERS ROGATORY.

2. Every orphans' court of this commonwealth shall have power to make rules regulating the taking of depositions of aged, infirm and going witnesses, and the issuance and execution of commissions to take testimony and letters rogatory.

NOTE.—This clause is also new, but is declaratory of the present law.

This subject was covered in substance by the 8th section of the Act of May 23, 1887 (P. L. 158) relating to the competency of witnesses, which provides that "in any civil proceedings the testimony of any competent witness may be taken by commission or deposition in accordance with the laws of this commonwealth and the rules of the proper court." *Per Criswell, P. J., Bleakley's Estate*, 28 Dist. 289, 37 Lanc. 29, 15 Del. 199.

In view of the age of the petitioner, her physical infirmities and the expense incident to a long journey, an appellant from the decree of the register of wills admitting to probate a writing purporting to be the last will and testament of a decedent, is a witness whose testimony may be taken by commission under this section of the Act. *Bleakley's Estate*, 28 Dist. 289, 37 Lanc. 29, 15 Del. 199.

154. ORAL DEPOSITIONS OUTSIDE OF STATE.

3. Where the testimony of any witness is desired to be read in evidence in any proceeding now or hereafter pending in any orphans' court of this commonwealth, and such witness resides in any other state, territory or possession of the United States of America, or in any foreign country, the court may, on the application of any party, provide for the taking, in such other state, territory, possession or foreign country, of the testimony of such witness or witnesses orally, before an examiner appointed by the court, or before any person authorized by the laws of such other state, territory, possession or foreign country to administer oaths.

In granting any such application the court may impose such terms as it shall deem proper, as to the payment by the party applying therefor of the costs and expenses involved, including reasonable counsel fees and traveling expenses, and may prescribe the notice to be given and the time within which such testimony shall be taken.

NOTE.—This is founded on Section 1 of the Act of June 8, 1911, P. L. 709, 5 *Purd.* 6091, which relates to "any of the civil courts of this commonwealth."

In view of the nature of the controversy under investigation (an appeal from the probate of an alleged will) and in view of the age of appellant, her physical condition and the expense incident to a long journey the court held that an oral examination of the witness as authorized by this section would be preferable to a commission in eliciting fully her knowledge on the subject in controversy. *Bleakley's Estate*, 28 *Dist.* 289, 37 *Lanc.* 29, 15 *Del.* 199.

155. PRODUCTION OF BOOKS AND PAPERS.

(c) The orphans' court shall have power to compel the production of any books, papers or other documents, necessary to a just decision of the question before them, or before an auditor or master.

NOTE.—This is the last part of Section 56 of the Act of 1832, P. L. 208, 3 *Purd.* 3380.

The first part of that section conferred the right to cross-examine parties in the orphans' court as though they were made defendants in a bill in equity for discovery, which provision is now obsolete in view of the later general acts on the subject.

156. PERPETUATION OF TESTIMONY.

(d) Every orphans' court of this commonwealth shall have the jurisdiction and powers of a court of chancery, so far as relates to the perpetuation of testimony in all cases, including cases of lost or destroyed records of such court, whether such records were lost or destroyed before or after the passage of this act, and the same proceedings, orders, decrees and judgments shall be had under this section, *mutatis mutandis*, as in cases now authorized by law, and with the like effect; and when proved, such records shall have the same legal operation as the original records would have had. Notice of any proceeding under this clause shall be given to all persons interested, or their guardians or committees.

NOTE.—This is founded on Section 1 of the Act of April 1, 1863, P. L. 205, 3 Purd. 3385, which, however, is limited to cases of lost or destroyed records. The first proviso of that section has been omitted, its substance being covered by a modification of the phraseology of the first part of the clause, and the last sentence has been substituted for the provision that notice shall be served upon “minors and their guardians.”

157. TESTIMONY IN PROCEEDINGS REMOVED FROM REGISTER OF WILLS; WHAT TESTIMONY TO BE BASIS OF DECISION.

(e) 1. On appeal from the decision of any register of wills, or in proceedings removed from any register of wills by certification, the orphans' court shall hear the testimony *de novo*, unless all parties appearing in the proceeding shall agree that the case shall be heard on the testimony taken before such register: *Provided*, That in all cases the court shall have power to require the production before it, for examination, of the witnesses already examined, or of any other witnesses.

NOTE.—This is a new clause, introduced in order to remove any possible doubt as to the procedure in such cases.

158. TESTIMONY TAKEN IN ORPHANS' COURT TO BE REDUCED TO WRITING.

2. The testimony of all witnesses examined in any cause litigated before any orphans' court on appeal from any register of wills, or on removal from any register of wills by certification, shall be taken in writing and made a part of the proceedings therein, upon which testimony the court having jurisdiction of such cause by appeal may affirm, reverse, alter or modify the decree of the orphans' court.

NOTE.—This is founded on Section 40 of the Act of March 15, 1832 (P. L. 135) 4 Purd. 4086, which was derived from Section 18 of the Act of April 13, 1791, 3 Sm. L. 28; the Act of 1832, however, referred to the register's court.

The words “on appeal from any register of wills, or on removal from any register of wills by certification,” have been inserted to show that the paragraph does not apply to other proceedings in the orphans' court.

159. ISSUES TO THE COMMON PLEAS,—IN GENERAL.

SECTION 21. (a) The orphans' court shall have power to send an issue to the court of common pleas of the same county for

the trial of facts by jury, whenever they shall deem it expedient so to do.

NOTE.—This is Section 55 of the Act of March 29, 1832, P. L. 208, 3 Purd. 3378.

See Klagholz's Est., 27 Dist. 95; Byerly's Est., 258 Pa. 410, 102 Atl. 143.

160. IN PROCEEDINGS REMOVED FROM REGISTER OF WILLS.

(b) Whenever a dispute upon a matter of fact arises before any orphans' court, on appeal from any register of wills or on removal from any register of wills by certification, the said court shall, at the request of either party, direct a precept for an issue to the court of common pleas of the county for the trial thereof, which, in the case of an issue devisavit vel non, shall be substantially in the following form: (L. S.) County, ss.
The Commonwealth of Pennsylvania: To the judges of the court of common pleas of the said county, greeting: Whereas, A. B., on the day of , in the year, etc., presented to G. H., our register of wills of said county, for probate, a certain writing hereto annexed, purporting to have been made the day of , in the year, etc., (or otherwise describing the paper in question), which said writing the said A. B. avers is the last will and testament of the said C. D., and whereas E. D., who is a son and heir of the said C. D. (or intermarried with F. D., who is a daughter and heir, etc., according to the fact), hath objected before our said register that the said writing was procured by duress and constraint (stating the matters of fact objected), and whereas our said register hath admitted (or refused to admit) said writing to probate as the last will and testament of the said C. D., and whereas the said E. D. hath appealed from the decree of our said register to our orphans' court for the said county (or as the case may be) and whereas the said E. D. (or A. B.) hath requested that an issue may be directed into our said court of common pleas to try by a jury the validity of the said writing, and the matters of fact which may be objected thereto in our said court; therefore, we command you that you cause an action to be entered upon the records of our said court, as of the day of the delivery of this our precept into the office of the prothonotary of our said court, between the said A. B. and the said E. D., so that an issue therein may be

formed upon the merits of the controversy between the said parties, and tried in due course according to the practice of our said courts in actions commenced by writ; and further, that you cause all other persons who may be interested in the estate of the said C. D., as heirs, relations or next of kin, devisees, legatees or executors, to be warned, so that they may come into our said court and become party to the said action, if they shall see cause, and that you certify the result of the trial so had in the premises into our said orphans' court. Attest. I. J., President Judge of the Orphans' Court of the said county.

Where the issue directed is other than an issue *devisavit vel non*, the foregoing form shall be changed, so far as necessary, in accordance with the circumstances of the case.

And the facts established by the verdict returned shall not be re-examined in any appeal.

NOTE.—This is Section 41 of the Act of March 15, 1832, 4 Purd. 4088, with the substitution of "orphans' court" for "register's court," and the insertion of the words beginning "on appeal" and ending "certification," in order to show that the section applies only to cases coming up from the register.

Section 41 of the Act of 1832 refers to the form of precept prescribed for issuance by the register. Since this form is embodied in the new Register of Wills Act, a similar reference cannot be made in the present section, and the form is therefore set forth at length, with the proper changes for an issue *devisavit vel non*.

Under this section of the act the dispute must be substantial and must arise from a conflict of testimony and must also be as to some matter of fact, material to the decision of the question at issue. The question of legitimacy of an alleged son and heir of the decedent is not such a material or essential question as to warrant the direction of a precept for an issue to the court of common pleas. *Wand's Est.*, 50 Pa. C. C. 516.

161. DISTRIBUTION OF PROCEEDS OF SALES OF REAL ESTATE,—AFFIDAVIT.

(c) 1. Before an issue shall be directed upon the distribution of money arising from any sale of real estate made under order of the orphans' court, the applicant for such issue shall make affidavit that there are material facts in dispute therein, and shall set forth the nature and character thereof, upon which affidavit the court shall determine whether such issue shall be granted, subject to appeal by such applicant, if the issue be refused, in like manner as in other cases in which such appeal is or may be allowed by law.

NOTE.—This is the proviso to Section 2 of the Act of April 20, 1846, P. L. 411, 3 Purd. 3379, which applies also to "sales under execution." While the subject-matter of this clause is probably covered by clause (a) of the present section, the Commissioners have concluded to recommend its inclusion. The section of the Act of 1846 is not recommended for repeal except so far as it relates to the orphans' court.

The following changes have been made: In lines 2 and 3, "any sale of real estate made under order of the orphans' court" has been substituted for "orphans' court sales." In line 8, "a writ of error or" has been omitted before "appeal," and, at the end, "appeal is or may be allowed by law" has been substituted for "writ now lies."

162. INVESTMENT OF FUND PENDENTE LITE.

2. Upon granting any such issue, it shall be discretionary with the court, upon the application of the party or parties appearing, by the record, prima facie entitled to the said fund, to order the same to be invested, pendente lite, in investments allowed by law in the case of trustees.

NOTE.—This is Section 3 of the Act of April 20, 1846, P. L. 411, 3 Purd. 3380, which, like Section 2 of that Act, is to be repealed only so far as it relates to the orphans' court.

In line 2, after "court," these words are omitted: "so soon as the money arising from such sale shall have been paid into court." At the end, "investments allowed by law in the case of trustees" has been substituted for "the debt of the United States, or some other sufficient security, subject to the decree of the court."

163. APPEALS,—RIGHT OF APPEAL AND ITS EFFECT.

SECTION 22. (a) Any party aggrieved by the definitive sentence or decree of any orphans' court, or his legal representatives, may appeal therefrom to the proper appellate court within six months from the time of pronouncing such final sentence or decree: *Provided*, That no appeal from any decree of such court, concerning the validity of a will, or the right to administer, shall suspend the powers or prejudice the acts of any executor or administrator to whom letters have been granted: *And provided further*, That no reversal or modification of any decree or proceedings of the orphans' court, for the sale of real estate, shall have the effect of divesting any estate or interest acquired under such decree or proceeding, by persons not party thereto, where the orphans' court had jurisdiction of the case.

NOTE.—This is founded on Section 42 of the Act of March 15, 1832, 4 Purd. 4092, and Section 59 of the Act of March 29, 1832, P. L. 213, 3

Purd. 3383-4. The former section relates to appeals from the register's court in cases where the sum in controversy exceeds \$150, and provides that the powers of an executor shall not be suspended by an appeal if he gives sufficient security to the register for the faithful administration of his trust, and that on his refusal to give security the register shall grant letters of administration during the dispute, which shall suspend the power of the executor during that time. In that section, the period for appeal is one year. The provisions which are omitted in the present draft seem unnecessary in view of the provisions of the Fiduciaries Act as to the requiring of security and the granting of letters pendente lite.

The first proviso of Section 59 of the Act of March 29, 1832, and Section 8 of the Act of May 19, 1874, P. L. 206, are omitted, having been repealed by Section 22 of the general appeals Act of May 19, 1897, P. L. 72.

See form of bond on appeal, 25.

164. DISPOSITION OF CASES ON APPEAL.

(b) The supreme and superior courts of this commonwealth shall, in all cases of appeal from the definitive sentence or decree of the orphans' court, hear, try and determine the same as to right and justice may belong, and decree according to the equity thereof; and may refer the same to auditors when, in their discretion, they may think proper.

NOTE—This is a combination of Section 4 of the Act of April 14, 1835, P. L. 276, 3 Purd. 3384, and Section 2 of the Act of June 16, 1836, P. L. 683, 3 Purd. 3385, extended so as to include the superior court.

165. SHORT TITLE.

SECTION 23. This act shall be known and may be cited as the Orphans' Court Act of 1917.

166. REPEALER.

Section 24. The following acts and parts of acts of assembly are repealed as respectively indicated. The repeal of the first section of an act shall not repeal the enacting clause of such act.

Sections 1, 8 and 9 of an act entitled "An Act for establishing orphans' courts," passed March 27, 1713, 1 Sm. L. 81, absolutely.

Sections 5, 6 and 18 of an act entitled "An Act to establish the judicial courts of this commonwealth, in conformity to the alterations and amendments in the constitution," passed April 13, 1791, 3 Sm. L. 28, absolutely.

Section 24 of an act entitled "An Act directing the descent of

intestates' real estates, and distribution of their personal estates, and for other purposes therein mentioned," passed April 19, 1794, 3 Sm. L. 143, absolutely.

Sections 40, 41 and 42 of an act entitled "An Act relating to registers and registers' courts," approved March 15, 1832, P. L. 135, absolutely.

Sections 1 to 4 inclusive, 52, and 55 to 60 inclusive of an act entitled "An Act relating to orphans' courts," approved March 29, 1832, P. L. 190, absolutely.

Sections 52 to 57 inclusive of an act entitled "An Act relative to the organization of the courts of justice," approved April 14, 1834, P. L. 341, absolutely.

Section 4 of an act entitled "Supplement to the act passed the twenty-ninth day of March, Anno Domini, one thousand eight hundred and thirty-two, entitled 'An Act relating to orphans' courts,'" approved April 14, 1835, P. L. 275, absolutely.

Section 2 of an act entitled "An Act supplementary to the various acts relating to orphans' and registers' courts, and executors and administrators, and the act relating to the measurement of grain, salt, and coal," approved June 16, 1836, P. L. 682, absolutely.

Section 19 of an act entitled "An Act relating to the jurisdictions and powers of courts," approved June 16, 1836, P. L. 784, absolutely, and Sections 20, 21 and 22 of the same act in so far as they relate to the orphans' court.

Section 8 of an act entitled "An Act to confer upon the orphans' court of Lancaster County certain powers in relation to the real estate of John Lindemuth, deceased, and for other purposes," approved April 4, 1843, P. L. 131, in so far as it relates to the orphans' court.

Sections 2 and 3 of an act entitled "An Act relative to lien creditors becoming purchasers at judicial sales, and for other purposes," approved April 20, 1846, P. L. 411, in so far as they relate to the orphans' court.

Section 2 of an act entitled "A further supplement to an act, entitled, 'An Act relating to executions,' passed the sixteenth day of June, one thousand eight hundred and thirty-six," approved April 21, 1846, P. L. 430, absolutely.

Section 18 of an act entitled "An Act relating to the bail of executrixes; to partition in the orphans' court and common

pleas; to colored convicts in Philadelphia; to the limitation of actions against corporations; to actions enforcing the payment of ground rent; to trustees of married women; to appeals from awards of arbitrators by corporations; to hawkers and pedlers in the counties of Butler and Union; to the payment of costs in actions by informers in certain cases; to taxing lands situate in different townships; and in relation to fees of county treasurers of Lycoming, Clinton and Schuylkill; to provide for recording the accounts of executors, administrators, guardians and auditor's reports; and to amend and alter existing laws relative to the administration of justice in this commonwealth," became a law April 25, 1850, by reason of the Governor's failure to return it within ten days, P. L. 569, absolutely.

Section 1 of an act entitled "An Act relating to official seals," approved March 6, 1854, P. L. 155, in so far as it relates to the orphans' court.

An act entitled "An Act relative to the perpetuation of testimony in cases of lost records," approved April 1, 1863, P. L. 205, absolutely.

Sections 2, 3, 4, and 6 to 10 inclusive of an act entitled "An Act relating to the organization and jurisdiction of orphans' courts, and to establish a separate orphans' court in and for counties having more than one hundred and fifty thousand inhabitants, and to provide for the election of judges thereof," approved May 19, 1874, P. L. 206, absolutely.

An act entitled "An Act authorizing the holding of orphans' courts by other than the regularly commissioned judges in certain cases," approved March 4, 1875, P. L. 5, absolutely.

An act entitled "An Act relating to orphans' courts," approved March 18, 1875, P. L. 29, absolutely.

An act entitled "An Act authorizing the president or additional law judges of the courts of common pleas to hold courts of quarter sessions, and oyer and terminer and orphans' courts, in certain cases," approved April 7, 1876, P. L. 19, in so far as it relates to the orphans' court.

An act entitled "An Act to provide for the appointment of a president judge of the separate orphans' courts, and to provide for the commission thereof," approved May 24, 1878, P. L. 131, absolutely.

An act entitled "An Act to regulate the compensation of auditors and commissioners," approved June 4, 1879, P. L. 84, in

so far as it relates to auditors and commissioners appointed by the orphans' court.

An act entitled "An Act to amend section three of the act of assembly of May nineteenth, one thousand eight hundred and seventy-four, entitled 'An Act relating to the organization and jurisdiction of orphans' courts, and to establish a separate orphans' court in and for the counties having more than one hundred and fifty thousand inhabitants, and to provide for the election of judges thereof, fixing the salaries of judges of separate orphans' courts,'" approved June 13, 1883, P. L. 91, absolutely.

An act entitled "An Act relative to the transfer of orders and decrees for the payment of money for the purpose of lien and execution into other counties than those where they were originally rendered," approved June 5, 1885, P. L. 78, in so far as it relates to orders and decrees of the orphans' court.

An act entitled "An Act relative to the granting of citations and rules to show cause, by the courts of this commonwealth," approved May 7, 1889, P. L. 102, in so far as it relates to the orphans' court.

An act entitled "An Act requiring all public records within this commonwealth to be kept in the English language," approved May 31, 1893, P. L. 188, in so far as it relates to papers filed or recorded in the orphans' court or the office of the clerk thereof.

An act entitled "An Act to authorize the judges of separate orphans' courts to hear and determine proceedings in equity, at the request of the judges of the common pleas," approved April 18, 1905, P. L. 208, absolutely.

An act entitled "An Act authorizing the parties in interest, or their counsel, to select auditors and masters needed in judicial proceedings except in divorce cases," approved April 1, 1909, P. L. 95, in so far as it relates to proceedings in the orphans' court.

An act entitled 'An Act to provide for the taking of testimony to be used in any of the civil courts of record in this commonwealth of witnesses residing in any other state or in any foreign country," approved June 8, 1911, P. L. 709, in so far as it relates to the orphans' court.

An act entitled "An Act to authorize the judges of separate orphans' court, at the request of the judges of the common pleas, to hear and determine all issues in the court of common pleas,

courts of oyer and terminer and general jail delivery, and courts of quarter sessions of the peace," approved July 19, 1913, P. L. 844, absolutely.

An act entitled "An Act to authorize the judges of the courts of common pleas, of judicial districts having separate orphans' courts, to hear and determine all matters in such courts, at the request of the judges thereof," approved April 21, 1915, P. L. 156, absolutely.

All other acts of assembly, or parts thereof, that are in any way in conflict with this act, or any part thereof, are hereby repealed.

THE REVISED PRICE ACT

of

June 7, 1917, (P. L. 388)

Preliminary Note by Commission.

The Act of April 18, 1853, P. L. 503, commonly called the Price Act, from the name of its draftsman, has been extremely beneficial in its results and no fundamental changes have been considered necessary. It has, however, been amended by numerous statutes, and the Commissioners have endeavored in this revision to arrange its provisions in more symmetrical order and to consolidate in it the changes that have been made from time to time. The notes that have been annexed to the several sections in the revised act as now reported sufficiently indicate the changes that have been made in phraseology and those that are due to amendments.

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167. TITLE.

AN ACT

Relating to the jurisdiction, powers and procedure of the orphans' court and the court of common pleas as to sales, mortgages, conveyances on ground rents, leases, extinguishment of

ground rents, partition, exchange, squaring and adjusting of lines between adjoining owners, consolidation and combination of mining lands and the leasing thereof, the joining by owners of undivided interests in making and taking conveyances in order to change the route or location of any right of way or passage over adjoining or other lands, and the subdivision of premises so as to command the highest price or greatest rents, and, for such purpose, the laying out or dedication of roads, streets, and alleys or the vacation of such as have not been accepted by the public authorities, where the court shall be of opinion that such decree will be to the interest and advantage of all those interested, and where the legal title is held by minors, lunatics, habitual drunkards or weak-minded persons, a married person whose spouse is a lunatic or has abandoned him or her for one year or has been absent and unheard of for seven years, by corporations having no capacity to convey or by any unincorporated association, by any religious, beneficial or charitable society or association incorporated or unincorporated, and the title is subject to forfeiture if real estate is held in excess of the amount prescribed by its charter or by law, by a corporation or individual or individuals and is subject to a trust of any description whatever, by any person as to whom a presumption of death may have arisen, or any interest wherein is held by any person under legal disability to dispose thereof; where the legal title is an estate tail or is subject to the lien of debts of a decedent not of record, contingent remainders, executory devises, or remainders to a class, some or all of whom may not be in being or ascertained; where estates shall have been devised or granted for special or limited purposes, where there is a power of sale but the time may not have arrived for its exercise, any preliminary act may not have been done to bring it into exercise, the time limited for its exercise may have expired, or any one or more persons required to consent or join in its exercise may be non compos mentis, have removed out of the state, have died, refuse to act, unreasonably withhold consent or be absent and unheard of; where there has been or shall be a defective appointment in any deed or will and the necessary power is not given to the executor, devisee or appointee to make sale and conveyance; where a trust has been created and no power conferred on the trustee to do any of the acts which the court is hereby empowered to authorize or confirm; and to the effects of such decrees.

NOTE.—This act is, in substance, a revision of the Price Act of April 18, 1853, P. L. 503, with its supplements. The Commissioners acknowledge their indebtedness to Roland R. Foulke, Esq., of the Philadelphia Bar, for valuable assistance in the drafting of the act.

168. WHAT RELIEF MAY BE GRANTED.

SECTION I. Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same, That the orphans' court, in all cases where real estate, or a ground rent issuing thereout,¹ shall be or shall have been acquired by descent or last will, partly by deed and partly by descent or last will,² or by purchase³ by a trustee, executor or guardian, and in all other cases the court of common pleas of each county of this commonwealth, shall have jurisdiction with respect to real estate situate within the county, and, in the cases hereinafter specified, to authorize⁴ or confirm⁵ :—

NOTE.—This is derived from Section 1 of the Price Act, 4 Purd. 3999, and supplements as noted below. It has been divided into clauses for the sake of clearness and convenience of reference.

The following clauses are recommended for omission :

(1) Purchase of other real estate when needful (adjoining) to that already owned by such party, or useful to the business thereon carried on or when necessary to protect any security or rent on property exposed to judicial sale. Provided that no corporation shall be so authorized to purchase beyond its charter license.

(2) Every power to sell in fee simple real estate created by deed or will shall be taken to confer authority to sell and convey, reserving ground rents or rents in fee, and the same to release and extinguish, according to law.

¹The words "or a ground rent issuing thereout" are added to make clear that the jurisdiction extends to ground rents purchased, etc.

²These words incorporate the provisions of the supplement of April 27, 1855, P. L. 368, Section 5, 4 Purd. 4031. The confirmatory act of April 21, 1856, P. L. 486, Section 1, 4 Purd. 4034, may be omitted.

³The words "by purchase by a trustee, executor or guardian" are inserted to make clear that the jurisdiction of the orphans' court refers to these cases, and dissipate any idea that the jurisdiction under the previous words is conferred only where the title has been acquired by gift under a will or deed.

⁴The cases in which the court may act come first in the Price Act. The proposed revision first collects together from the act and the supplements the various dispositions authorized. The advantages are that these are all brought together and it is made clear that the court may make any of the dispositions in any of the cases where jurisdiction is conferred.

⁵"Confirm." This word incorporates the provisions of the Act of April 13, 1854, P. L. 368, Section 3, 4 Purd. 4030.

See Behringer's Est., 265 Pa. 111; 108 Atl. 414.

This act does not authorize the orphans' court or confer jurisdiction thereon to ratify sales and exchanges of real estate under a trust created by deed. The word "trustee" used in connection with the words "executor or guardian" clearly indicate that the trustee contemplated therein is of a testamentary character or of one appointed by the orphans' court on connection with a decedent's estate, and that it was not intended that jurisdiction should be conferred upon the orphans' court in case of a trust *inter vivos* or a trust of any other kind than testamentary in character so that a proceeding in the orphans' court for the sale or exchange of lands by a trustee, who holds under a deed of trust, will not confer marketable title. Garrison's Est., 65 P. L. J. 778.

A trustee appointed in another state to execute a trust created by the will of a decedent, domiciled in that state, there being no power or direction to sell contained in the will, will not be authorized by an orphans' court of Pennsylvania either under this act or the Fiduciaries Act to sell real estate in this state. Jones' Est. 47 Pa. C. C. 463, 28 Dist. 282.

While under the act the court undoubtedly has power to confirm a sale which it could have authorized, yet it cannot allow a sale not authorized by the act, where by will testator gave the real estate to his wife for life with remainder to his children, whose guardian, the petitioner, had no status with relation to the real estate. A mere averment that the sale would be for the "best interest and advantage of the children of which the petitioner is guardian" cannot confer jurisdiction. Maule's Est., 37 Lanc. 231.

Where it is to the interest and advantage of the parties interested the court, under this act, has authority to decree a sale of decedent's real estate against the objections of some of the living owners who are *sui juris*. Jefferies' Est., 37 Lanc. 435.

Under this act the court of common pleas has jurisdiction to entertain the petition of trustees of a church to borrow money, where due notice of such application has been given. In re St. Joseph's Church, 49 Pa. C. C. 315, 16 Sch. 327.

169. SALES OF REAL ESTATE, ETC.

(a) The sale, mortgaging, conveying on ground rent, and leasing thereof, of the extinguishment or assignment of ground rents issuing thereout;

The words "extinguishment or assignment of ground rents" are inserted to make clear that the court has jurisdiction to direct the extinguishment or assignment of a ground rent, as to which there is now some doubt.

There is no need for a petition by a trustee to extinguish a ground rent, where from the facts involved there is no room for the exercise of

discretion by the court and its function would become purely ministerial. The Revised Price Act makes no change that affects the case. The words "extinguishment or assignment of ground rents" were added to remove a doubt that had arisen in the profession and make it clear that the court might decree an extinguishment as well as a sale or assignment of a ground rent in cases where the court is given jurisdiction under the provisions of the act. *Janney's Est.*, 27 Dist. 709.

170. AMICABLE PARTITION, ETC.

(b) The amicable partition and exchange thereof;

In the Price Act, Section 1, and incorporating act of May 23, 1913, P. L. 345, 6 Purd. 7051, in connection with the clauses in the next section conferring jurisdiction where the legal title is held by persons under disability, fiduciaries, etc.

171. SQUARING AND ADJUSTING LINES.

(c) The squaring and adjusting of lines between adjoining owners;

Taken from Section 7 of the Price Act, 4 Purd. 4027. The words "without public or private sale" are recommended for omission, as the words "squaring and adjusting" sufficiently describe the transaction and necessarily exclude the idea of a sale.

172. CONSOLIDATION OF MINING LANDS.

(d) The consolidation and combination of mining lands with other adjoining mining lands, so that they shall form one tract, and the leasing thereof in such manner that the several persons interested therein shall be seized of undivided interests in the whole, proportionate to their several undivided interests before such combination and consolidation, the rents or royalties received under the lease to be apportioned among them in like proportions.

This incorporates the Act of June 8, 1874, P. L. 277, Section 1, 4 Purd. 4033.

173. RIGHTS OF WAY.

(e) The joining by owners of undivided interests in making and taking conveyances, in order to change in part or in whole the route or location of any right of way or passage existing over and upon adjoining or other lands

This incorporates the Act of April 18, 1864, P. L. 462, Section 1, 4 Purd. 4031. The words "without public or private sale" are recommended for omission for the reason set forth in note 8, *supra*.

174. SUBDIVISION OF PREMISES; DEDICATION OF STREETS.

(f) The subdivision of the premises so as to command the highest price or greatest rents, and for such purpose, where the premises shall admit of or require it, the laying out and dedication of roads, streets and alleys, or the vacating of such as shall not have been paid for or received into actual use by the public, if found to be inconvenient and to make an unprofitable division of the property;¹¹

Provided, That such court shall be of the opinion that such decree will be to the interest and advantage of all those interested therein and without prejudice to any trust, charity or purpose for which the real estate or ground rent shall be held and without the violation of any law which may confer an immunity or exemption from sale or alienation.

¹¹Taken from Section 4 of the Price Act, 4 Purd. 4022.

It is necessary in order for the court to reach a conclusion that a decree will be to the interest and advantage of those interested "that such facts shall be set out in the petition that will enable the court to form an opinion, such as the rental value of the property cost of maintenance in the way of repairs, taxes, water rent and other charges and such other facts as to dilapidation and decay, if any. It is not sufficient to say in the petition that it is to the interest of the minor that the sale be carried into effect. Such a statement is the opinion of the petitioner, which is, of course, of value, but it does not meet the requirements of the court which requires that the court shall conclude that it is for the best interest of the minor that the sale be made; and that conclusion can only be based upon facts contained in the petition, or by the taking of testimony before an auditor or the court." *Scott's Estate*, 49 Pa. C. C. 295.

A petition will be refused which does not disclose the name of the proposed purchaser and is silent as to the fact that the sale can be made without prejudice to any trust, charity or purpose for which the real estate shall be held and without the violation of any law which may confer an immunity or exemption from sale or alienation. *Scott's Est.*, 49 Pa. C. C. 295.

175. CASES IN WHICH COURT MAY GRANT RELIEF.

SECTION 2. The several courts aforesaid shall exercise the jurisdiction conferred by Section 1 of this Act in all cases:

NOTE.—This is derived from Section 2 of the Price Act, amended by the Act of June 14, 1897, P. L. 144, Section 1, 4 Purd. 4003.

The following clauses are recommended for omission:

Where a decedent shall have contracted by parol to sell real estate, and those interested do not think it expedient to plead the statute requiring

such contracts to be in writing to enable the purchaser to recover the real estate agreed to be sold. When real estate shall have been purchased or any ground rent reserved and be held by any person acting in a trust of fiduciary capacity. Section 2 of the Price Act.

Whenever in proceedings in partition in equity it shall appear that real estate cannot be divided without prejudice to the interests of the owners. This clause is recommended for omission at it is now superfluous in view of the provisions of the Act of March 14, 1857, P. L. 97, Section 3, and the later statutes relating to partition in equity. See Act of July 14, 1897, P. L. 268, 3 Purd. 3417.

176. TITLE IN MINORS, ETC.

(a) Where the legal title is held: (1) By minors, lunatics or habitual drunkards, so duly found by inquisition, or by weak-minded persons for whom guardians have been appointed.¹ (2) **By a wife whose husband is a minor, or by a married minor whose spouse is a minor, or by a married woman or married man whose spouse is a lunatic, or has abandoned him or her for one year or has been absent and unheard of for seven years.*² (3) By corporations of any kind having no capacity to convey or by any unincorporated association.³ (4) By any religious, beneficial or charitable society or association incorporated or unincorporated, and the title is subject to forfeiture if real estate is held in excess of the amount prescribed by its charter or now or hereafter prescribed by law.³ (5) By a corporation of any kind or individual or individuals and is subject to a trust of any description whatever.⁴ (6) By any person who may have been absent and unheard from for seven years under those circumstances from which the law would presume his or her decease.⁵ (7) Or any interest therein is held by any person under legal disability to dispose thereof.⁶

¹The words "or weak minded persons" have been added; but it is not intended that the provisions of Section 6 of the Act of May 28, 1907, P. L. 292, 6 Purd. 6569, should be repealed.

²This section throws together and makes similar the provisions as to the disability of the spouse of a married man or a married woman. The case of the minority of the wife is omitted as unnecessary in view of the Act of March 22, 1865, P. L. 30, 1 Purd. 1155. In providing for the case of a woman with a lunatic husband, this section incorporates to that extent, the ambiguous Act of April 11, 1866, P. L. 780, 4 Purd. 4034, which extends only to the common pleas.

*That portion of clause (2) in italics was added by the amendatory Act of May 2, 1919, (P. L. 111).

³Several cases are to be provided for (a) Corporations having no capacity to convey, a very rare case; (b) Unincorporated societies, etc., which could not convey at law; (c) Incorporated and unincorporated religious societies, etc., which may hold real estate in excess of the amount prescribed by law. The words of the Price Act are "Where real estate shall be held for or owned by * * * religious, beneficial or charitable societies or associations, incorporated or unincorporated," which words do not make clear just what the exact jurisdiction conferred is.

⁴This is designed to cover all cases of trusts and make unnecessary the words of the Price Act which are as follows: "When real estate shall be held for minors, lunatics, habitual drunkards so declared by inquisition * * * the sole and separate use of married women, for religious, beneficial or charitable societies or associations, incorporated or unincorporated, or for any other corporation, or by trustees for any public or private use or trust, and generally in all cases where estates have been or shall be devised or granted in trust or for special or limited purposes."

⁵Taken from Price Act, no change.

⁶Taken from Price Act.

Title held under a declaration of trust whereby the legal owner agrees to convey the real estate "unto any person or persons named and designated" "upon request or requests made to us in writing" by the equitable owner, who subsequently died, is not held under a trust contemplated by clause (5) authorizing the court to act where property is "subject to a trust of any description whatever." The trust here is passive. All possible purposes of the trust ended on the death of the equitable owner. Title vested in her heirs or devisees whose remedy is by partition. *Behringer's Est.*, 265 Pa. 111; 108 Atl. 414.

Under clauses (3) and (4) the court of common pleas has jurisdiction to entertain the petition of the trustees of a church to borrow money, where proper notice of such application has been given. In *re St. Joseph's Church*, 49 Pa. C. C. 315, 16 Sch. 327.

Where an orphan house was created by a will, whereunder it was provided that no part of the estate should ever be sold or in any manner be severed from the orphan house, but that it should remain united thereto whole and undivided forever, but the testator also added in another part of his will "so far as human frailties will permit," the court decided on a petition by the charitable corporation, trustee, for permission to lay out in lots to be sold at public sale subject to ground rent a certain tract unimproved and unproductive for a long time, yielding insufficient revenue to pay the taxes, after due notice and hearing and it appearing to be to the best interest of the trust estate that, under the above section of the Revised Price Act and generally from the intent of the whole act itself said petition should be granted and in so holding the court said:

"In Pennsylvania, prior to 1853, such matters were disposed of by the Legislature. In that year the power was placed in the court by the Price Act (April 18, 1853, P. L. 503) which, in the preamble provided:

"Whereas, The general welfare requires that real estate should be freely alienable, and be made productive to the living owners thereof. And,

whereas, in matters which the judiciary is competent to hear and decide, it is expedient that the courts should adjudicate them after a full hearing of all parties rather than that they should be determined by special legislative acts and upon *ex parte* hearing.'

"This authority is now given by the Revised Price Act of June 7, 1917, P. L. 388.

"Concerning this legislation, it was said by Agnew, J., in Burton's App. 57 Pa. 213-219: 'The design is well expressed in the preamble of the act, to make real estate freely alienable and productive to the living owners thereof. Though not unmindful of the future, and of the duty owing to posterity, the special interests of society belong to the men of today, rather than to those of another generation. The intention of this law is manifestly to unite the cords which fetter the real estate of the commonwealth, whether bound around it by the disabilities of persons, the limitations of contingent interests, or by restrictions to limited uses and purposes, and at the same time to preserve to every interest its proper share in the result. This law being beneficent and remedial is not to be so construed as to defeat its main intent.'

"After considering all of the authorities above quoted, we are of opinion that this court has authority under the Revised Price Act of 1917, to grant the prayer of this petition, and it is so ordered." Frey's Est., 50 Pa. C. C. 468. See also Myers v. Crick, 271 Pa. 399.

177. ESTATES TAIL AND REMAINDERS.

(b) Where the legal title is an estate tail or is subject to contingent remainders, executory devises, or remainders to a class, some or all of whom may not be in being or ascertained at the time of the entry of the decree.

In this clause are thrown together all cases of legal limitations of the title, and the language incorporates, so far as gifts to a class are concerned, the provisions of the Acts of June 14, 1897, P. L. 144, Sec. 1, 4 Purd. 4003; June 15, 1897, P. L. 159, 4 Purd. 4033. The Act of June 14 provides for vested remainders which are liable to open and let in after-born children. The Act of June 15 provides for "Lands * * * devised or granted for life or for the life of another, and with remainder limited to a class of persons, some or all of whom may not be in being at the time of the decree." "The entry of the decree." These words are better English than the words "the time of the decree," which were probably sufficiently plain. The words "or ascertained" are added because a case may occur of a remainder to a class of persons in being but not ascertained, *e. g.* "remainder to the children of my daughter living at the time of her death." The children born are in being but not ascertained as the ones who will take at the death of the daughter.

The words "the lien of debts of a decedent not of record" are omitted in line 2, this provision seeming to be unnecessary since the lien has been reduced by the Fiduciaries Act to one year (see 418 *infra*).

178. ESTATES FOR SPECIAL PURPOSE.

(c) In all cases where estates shall have been devised or granted for special or limited purposes.

These words may appear to be superfluous, but it is thought best to retain them.

179. INCOMPLETE POWER OF SALE.

(d) Where there is a power of sale but (1) the time may not have arrived for its exercise, (2) any preliminary act may not have been done to bring it into exercise, (3) the time limited for its exercise may have expired, (4) any one or more persons required to consent or join in its exercise may be a minor, *non compos mentis*, removed out of the state, have died, refuse to act, unreasonably withhold consent, or be absent and unheard of.

Taken from the Price Act. The words "be absent and unheard of" are added. The words "a minor" are inserted to give, in cases under this Act, the power conferred by Section 15 of the Act of July 27, 1842, P. L. 439, 4 Purd. 4885, upon the common pleas.

Where petitioner, surviving trustee under a declaration of trust, has no "power of sale" but only an obligation "to convey the real estate described—upon request or requests made—in writing," she has no discretion in the matter and her duty is to obey the wish or whim of the real owners, whether she believes it to be wise or otherwise, provided only it is expressed "in writing." Such a matter is not within the contemplation of this section of the Act. The trust is passive and title vested in the equitable owners. *Behringer's Est.*, 265 Pa. 111, 108 Atl. 414.

180. DEFECTIVE APPOINTMENT.

(e) Where there has been or shall be a defective appointment in any deed or will and the necessary power is not given to the executor, devisee or appointee to make sale and conveyance of real estate.

Taken from Section 2 of the Price Act.

181. TRUST WITHOUT POWER OF SALE.

(f) Where a trust has been created and no power conferred on the trustee to do any of the acts which the court is empowered to authorize or confirm under the provisions of Section 1 hereof.¹¹

Such jurisdiction may be exercised whether the ownership or interest in real estate be held in severalty, joint tenancy or ten-

ancy in common, or by husband and wife as tenants by entireties.¹²

¹¹Added because the case where a trustee has no power of sale is not expressly covered by the Price Act.

¹²The word "coparceny" in the original act is omitted, as this tenancy is unknown in Pennsylvania.

This clause relates only "to a trust which is valid and subsisting at the time relief is sought and not to one which is purely passive, or having once been active has ceased and determined." Hence, title held under a declaration of trust whereby the legal owner agrees to convey the real estate "unto any person or persons named and designated—upon request or requests—made—in writing" by the equitable owner, who subsequently died, is not held under a trust contemplated by this section. The trust here is passive. All possible purposes of the trust ended on the death of the equitable owner and title then vested in her heirs or devisees whose remedy is by partition. *Behringer's Est.*, 265 Pa. 111, 108 Atl. 414. See also *Myers v. Crick*, 271 Pa. 399.

182. EXISTING LAWS NOT IMPAIRED.

SECTION 3. Nothing herein contained shall be taken to repeal or impair the authority of any act of assembly, general or private, authorizing the sale of real estate by decree of court or otherwise, nor to affect or impair any rights or powers, otherwise existing in any person or corporation to do any of the acts which the court is empowered to authorize or confirm under the provisions of Section 1 of this Act.

NOTE.—This is derived from Section 2 of the Price Act, amended by Act of June 14, 1897, P. L. 144, 4 *Purd.* 4003, 4016.

183. PETITION CITATION AND NOTICE.

SECTION 4. All jurisdiction conferred by this act on the orphans' court or the court of common pleas shall be exercised on the petition of any party in interest supported by oath or affirmation; and if all proper parties shall not voluntarily appear as petitioners or respondents, the court shall fix a day for them to appear and cause a citation to be served on all persons in being who shall not have appeared, and who shall have any present or expectant interest in the premises, warning them to appear, and that they shall be heard on the day designated, and for those who cannot otherwise be served, cause advertisement to be made in manner most likely to afford notice, and service made in any part of the United States and the territories and possessions thereof, or elsewhere, with oath or affirmation of the

fact, taken before any judge or justice of the peace or notary public, or any person authorized by the laws of the United States to take oaths or affirmations in foreign countries, and filed of record, shall be good service. Service having been made as aforesaid, the court shall, on the day fixed, make such decree as shall be proper in the premises. Guardians shall be notified and appear for their wards; and if minors have no guardian, the court may appoint one for them in the manner now or hereafter prescribed by law for the appointment of guardians, and such appointment may be made on the petition of any party interested with notice to the persons who shall by law be charged with the duty of petitioning for the appointment of a guardian. Committees and guardians shall be notified and appear for lunatics, habitual drunkards and weak-minded persons, and in each of such cases notice shall be given to the next of kin. Trustees shall be notified and appear for the cestuis que trust, provided that cestuis que trust of age and sound mind, having vested interests or interests subject to a condition precedent, shall also be notified, and all cestuis que trust not in being or unascertained shall be represented by the trustees aforesaid.

NOTE.—This is founded on Section 3 of the Price Act, 4 Purd., 4017, and has been extended to include parties in interest in foreign countries or to authorize service in foreign countries.

See forms 58 to 66. See Act of July 11, 1917, (P. L. 790) Secs. 623-4 *infra*.

184. WHO SHALL EXECUTE DECREE.

SECTION 5. In all cases where, under the provisions of this Act, sales, mortgages, leases, or conveyances on ground rent shall be authorized or directed, the same shall be made by executors, administrators, guardians, trustees, committees or owners having a present vested interest, or trustees appointed for the purpose, as the court may order.

NOTE.—This is founded on a part of Section 4 of the Price Act, 4 Purd. 4019, with the addition of the provision as to trustees appointed for the purpose.

185. APPOINTMENT OF TRUSTEES TO MAKE SALE AND INVEST PROCEEDS WHERE MINORS HAVE REMAINDER INTERESTS.

SECTION 6. Where lands and tenements are held by will or otherwise, for life or *pur autre vie*, by any person or persons,

with remainder to any minor or minors, and it shall appear to the court of the proper county, that it would be to the interests of such minor or minors that the same should be sold, in every such case upon the application of the tenant or tenants for life, or pur autre vie, as the case may be, the said court shall appoint a trustee to make sale of said lands; and the said trustee shall receive and hold the proceeds of such sale in trust for the parties in interest therein, and shall invest the same in investments authorized by law, and shall pay the interest thereof, as it shall accrue, to the tenants for life, or pur autre vie, until the estate for life, or pur autre vie, shall have terminated, and shall then pay over the principal sum to the person or persons entitled to such remainder.

NOTE.—This is Clause II of Section 1 of the Act of April 3, 1851, P. L. 305, 1 Purd. 1119, altered by substituting "invest the same in investments authorized by law" for "loan the same upon good real estate security, upon bond and mortgage," and by omitting the word "orphans" in the fourth line, and the reference to confirmation of the sale.

The remainder of Section 1, and Sections 2, 3 and 4 of the Act of 1851 are recommended for repeal as being sufficiently covered by other sections of the present draft.

See form 67.

186. EFFECTS OF DECREE.

SECTION 7. Every such decree made by the court shall have the effect as to the title authorized to be transferred (a) Of a common recovery to bar an estate tail or a remainder, whether contingent or to a class. (b) Of barring executory devises. (c) Of defeating the right of the commonwealth to forfeit real estate that may have been held by or for any corporation in excess of the amount now or hereafter duly authorized by law, only, however, in the case where no proceedings to procure a forfeiture shall have been commenced before the filing of the petition. (d) Of discharging the lien of decedents' debts not of record. In all cases where the proceedings shall be for the purpose of freeing the title of any of the limitations or defeasibility described in this section, that purpose shall be set forth in the petition in addition to the explanation of the title.

NOTE.—This is derived from Sections 5 and 6 of the Price Act, 4 Purd. 4024-5. The jurisdiction to sell for the purpose of discharging the lien of debts not of record is omitted above as unnecessary, but this does not prevent the discharge of such liens by a sale under the Act. In the

last sentence, "or liens" is omitted after "limitations," and "or defeasibility" substituted.

187. TITLE TRANSFERRED.

SECTION 8. The title transferred in pursuance of any such decree of the court shall be such as is authorized in the decree, which title shall be indefeasible by any person ascertained or unascertained or any class of persons mentioned in the petition or decree and having a present or expectant interest in the premises and shall be unprejudiced by any error in the proceedings of the court, and where security shall be entered in accordance with the provisions hereof, no party who shall pay over money in pursuance of the decree of the court shall be liable to see to the application thereof, or be in any manner liable for or affected by any lien of debts of a decedent not of record, or by any trust, limitation of, or defects in the title set out in the petition or decree in pursuance of which the money is paid over.

NOTE.—This is derived from Section 5 of the Price Act, 4 Purd. 4023.

188. PAYMENT OR FORECLOSURE OF MORTGAGE.

SECTION 9. In all cases where the court shall authorize or confirm the making of a mortgage, in any of the cases provided for in this Act, the title shall upon the mortgage being duly paid and satisfied of record revert to its former condition, except that nothing herein contained shall operate to extend the lien of the debts of a decedent not of record beyond the time now or hereafter allowed by law, and upon legal proceedings being brought upon the mortgage or bond accompanying the same as may now or hereafter be provided by law and the title being sold at sheriff's sale, in pursuance of such proceedings, the surplus proceeds of the sale, if any, after paying the mortgage, with interest and all costs, and liens, which may by law be payable out of the fund, shall be paid over to the party who made the mortgage, or such other person as the court may direct or appoint for that purpose, to be held by him as part of the mortgage money and subject to the same liens or limitations, provided that the sheriff shall not pay over any such sum until such additional bond shall be filed as the orphans' court may require under the circumstances of the case.

NOTE.—This is a new section, covering matters not provided for in the Price Act.

**189. PURCHASE OR MORTGAGE MONEY, ETC.—
HOW HELD AND APPLIED; MAINTENANCE
AND EDUCATION OF MINORS.**

SECTION 10. The purchase money, mortgage money, ground or other rents reserved or the title received in the case of an exchange or partition, for the title subject to a lien or limitation, shall be held for and applied to the use and benefit of the same persons and for the same interests, legal or equitable, present or future, vested, contingent or executory as the title so sold, mortgaged, conveyed on ground rent, let, partitioned or exchanged had been subject or held excepting only the case of an estate tail or the title of a corporation subject to forfeiture which in each case shall by the proceedings, without the necessity of a bond being filed by either the corporation or the tenant in tail, be converted into an absolute estate in fee-simple and all remainders, whether contingent or to a class, executory devises, and debts of a decedent not of record shall be transferred to the fund or title raised by the proceedings in pursuance of the decree, as to which fund or title they shall take effect in like manner as they would have taken effect as to the title transferred under the decree. The court shall make such order or orders from time to time as to the distribution or investment of such funds as may be requisite to protect the interest of all persons who are or may become entitled thereto or to any part thereof. In every case of a sale, mortgage, lease or conveyance on ground rent under the provisions hereof, the purchase money, mortgage money, ground rent or other rents reserved shall nevertheless have and retain the quality of real estate as respects the devolution under the intestate laws of the interest of any infant, lunatic, or person non compos mentis as whose property the land was sold, mortgaged, leased or conveyed on ground rent. The court having jurisdiction may direct the application of such proceeds or part thereof for the maintenance and education of minor parties whose personal estate shall be insufficient for such purposes, or generally for the maintenance or education of parties having the like interests vested or expectant, provided such moneys can be equally and equitably so applied and without diminution of the capital that may of right become the property of parties having unbarred interests or title in remainder, or by executory devise.

NOTE.—This is derived from Section 6 of the Price Act, 4 Purd. 4025, and Section 2 of the Act of June 15, 1897, P. L. 159, 4 Purd. 4033.

**190. APPLICATION OF MONEYS TO PAYMENT OF
LIENS OR IMPROVEMENT OF REAL ES-
TATE.**

SECTION 11. No principal moneys raised by sale or mortgage, as aforesaid, shall be expended for any other purpose than for the payment of liens upon or the improvement of the same real estate when mortgaged, or other real estate when held for the same uses and persons, except as provided in Section 10 of this Act; and it shall be the duty of the court to decree the proper application of all purchase moneys and rents, with the aid of an auditor when deemed necessary, to the discharge of liens and to parties interested, as and when they may be entitled.

NOTE.—This is part of the proviso to Section 6 of the Price Act, 4 Purd. 4025.

**191. APPOINTMENT OF MASTER TO REPORT ON
EXPEDIENCY OF GRANTING APPLICA-
TION.**

SECTION 12. In all cases where an application shall be made to the court for a decree authorized under any of the provisions of this Act, the court may appoint a suitable person as master to investigate the facts of the case, and to report upon the expediency of granting the application and, in cases where authority is asked to make a sale or mortgage, upon the amount to be raised thereby; and upon such report being made, the court may decree accordingly.

NOTE.—This is copied from Section 16 (e) of the Fiduciaries Act (see 436 *infra*).

See Act of July 11, 1917 (P. L. 790) Secs. 623-4 *infra*.

**192. BOND OF PERSON OR CORPORATION CARRY-
ING OUT DECREE.**

SECTION 13. In all cases where the carrying out of any decree of the court under the provisions of this Act shall involve the receipt of money by the person carrying it out, the court shall direct the person acting under the decree to file a bond to the commonwealth in a sufficient amount conditioned for the proper application of all moneys to be received, which bond shall inure to the benefit of all parties interested and be executed by two individual sureties or by one corporate surety, approved by the

court, and before any such decree shall be executed, such bond, with sureties as may be required, shall be filed: *Provided*, That where a corporation duly authorized by law, shall be designated to carry out any such decree, the court may, in lieu of security as aforesaid, permit such corporation to enter its own bond without surety.

NOTE.—This is copied from Section 16 (f) of the Fiduciaries Act (see 437 *infra*) which is founded in part on Section 6 of the Price Act, 4 Purd. 4026.

Section 10 of the Price Act, 4 Purd. 4029, reads as follows: "The directions given in the sixth section of this Act in regard to the security to be given in cases of sales, mortgage, or letting of real estate, and the condition of the bond or security therein prescribed, shall apply to all cases of sales or mortgage of real estate by order of the courts of this commonwealth: *Provided*, That no decree for the sale, mortgaging, or letting of any real estate under the provisions of this Act, shall be made except when the president of the court, or the law judge or judges thereof, shall be present, and that the acts in relation to special courts, where the president judge shall be interested, related to parties in interest, or otherwise incapable of acting, shall apply to all such provisions."

This section was apparently introduced in the Price Act to cure the inconsistency between Sections 4 and 6: Thorn's Appeal, 35 Pa. 47. The Commissioners recommend its repeal as unnecessary in the Revised Act.

See form 23.

Upon the entry of such security the court of common pleas has jurisdiction to entertain the petition of the trustees of a church to borrow money due notice of such application having been given. In re St. Joseph's Church, 49 Pa. C. C. 315, 16 Sch. 327.

193. NOTICES OF PUBLIC SALES.

SECTION 14. Whenever, by the provisions of this Act, it shall be lawful for the court to order the public sale of real estate, public notice of such sale shall be given by the person who is to make the sale, once a week for a period of three weeks before the day appointed therefor, by advertisement in at least one newspaper published in the county, if there be one, or if there be none, then in an adjoining county; and in all cases, notice shall also be given by handbills, one of which shall be posted at a conspicuous place on the real estate proposed to be sold, and at least three of which shall be posted at three of the most public places in the vicinity of such estate.

NOTE.—This is copied from Section 16 (g) of the Fiduciaries Act (see 438 *infra*) and, for the sake of uniformity, is substituted for the provisions of Section 4 of the Price Act, 4 Purd. 4021.

194. SECURING UNPAID PURCHASE MONEY BY MORTGAGE.

SECTION 15. Whenever, under the provisions of this Act, the court has power to authorize or confirm a sale of real estate, the same may be made upon such terms as the court shall approve, all unpaid purchase money to be secured on the premises by mortgage.

NOTE.—This is copied from Section 16 (h) of the Fiduciaries Act (see 439 *infra*) which is derived in part from Section 4 of the Price Act, 4 Purd. 4022.

195. ACKNOWLEDGMENT OF DEEDS, MORTGAGES AND LEASES.

SECTION 16. All deeds, mortgages or leases executed in pursuance of any decree of the court under the provisions of this Act may be acknowledged before any officer or person now or hereafter authorized by the laws of this commonwealth to take the acknowledgment of deeds and other instruments of writing to be recorded therein.

NOTE.—This section is designed to make the law relating to the acknowledgment of instruments executed under the authority of the Act similar to the general law prevailing in such cases. There seems to be no reason now for making any special distinction as to the acknowledgment of such instruments. The various acts supplementing the Price Act relating to acknowledgments are as follows:

Act of April 13, 1854, P. L. 368, Section 1, 4 Purd. 4029; April 1, 1863, P. L. 187, 4 Purd. 4031; March 23, 1867, P. L. 43, Section 1, 4 Purd. 4032; April 17, 1866, P. L. 108, as amended by Act of April 22, 1903, P. L. 241, 4 Purd. 4031.

196. EFFECT OF DEATH, ETC., OF FIDUCIARY DESIGNATED TO CARRY OUT DECREE WHERE ONLY ONE FIDUCIARY.

SECTION 17. (a) In all cases where the sale of real estate shall be made by an executor, administrator, guardian or trustee under an order of, or confirmed by, the court, or where the making of a mortgage by such fiduciary shall be authorized by said court, and the letters testamentary or of administration shall be re-

voked, or the executor, administrator, guardian or trustee shall be removed, or shall die, or become insane, or otherwise be incapable, before a conveyance is made to the purchaser, or before a mortgage is executed and delivered, it shall be lawful for the successor of such executor, administrator, guardian or trustee, having first given security, to be approved by the said court, for the faithful appropriation of the proceeds of such sale, to execute and deliver to the purchaser a deed of conveyance for the estate so sold, on the purchaser's full compliance with the terms and conditions of sale, or to execute and deliver said mortgage. If there shall be no such successor who shall have given security as aforesaid, the said court shall have power, on petition of the purchaser, to direct the clerk of the court to execute and deliver to the purchaser the necessary deed of conveyance, on his full compliance with the terms and conditions of sale, paying into court the moneys payable, and executing and delivering to the clerk any bond and mortgage required by the said terms and conditions, which moneys and bond and mortgage shall remain subject to the disposition of the court; or, where the making of a mortgage by a fiduciary shall be authorized by said court, the court, under the circumstances aforesaid, shall have power to direct the clerk of the court to execute and deliver such mortgage. The like proceedings may be had where an executor, administrator, guardian or trustee shall neglect or refuse to execute and deliver such deed or mortgage for the space of thirty days after due notice of an order of the court requiring him to execute and deliver the same.

NOTE.—This is modeled upon Section 16 (j) 1 of the Fiduciaries Act (see 441 *supra*).

197. WHERE JOINT FIDUCIARIES.

(b) In all cases where the sale of real estate shall be made by co-executors, co-administrators, co-guardians or co-trustees under an order of, or confirmed by, the court, or where the making of a mortgage by such co-fiduciaries shall be authorized by said court, and if one or more of such co-fiduciaries shall be removed, or shall die, or become insane, or otherwise be incapable, before a conveyance is made to the purchaser, or before such mortgage is executed and delivered, said court may, upon the facts being made to appear by petition duly verified, authorize the surviving or remaining fiduciary or fiduciaries to execute and deliver to the

purchaser a deed of conveyance for the real estate so sold, on the purchaser's full compliance with the terms and conditions of sale, or to execute and deliver such mortgage.

NOTE.—This is modeled upon Section 16 (j) 2 of the Fiduciaries Act (see 442 *infra*).

198. WHERE SALE HAS NOT BEEN EFFECTED.

(c) Where authority is or shall be given by decree of any court to executors, administrators, guardians or trustees to sell real estate, and any of such executors, administrators, guardians or trustees shall have died, been removed, become insane or otherwise be incapable, or cease to act, before a sale is effected, in all such cases said court may, upon the facts being made to appear by petition duly verified, authorize the surviving or remaining fiduciary or fiduciaries to effect such sales, with as full effect in all particulars, as if effected or executed by the executors, administrators, guardians or trustees in office at the time the sale was originally decreed.

NOTE.—This is modeled upon Section 16 (j) 3 of the Fiduciaries Act (see 443 *infra*).

199. TITLE OF PURCHASER OR MORTGAGEE NOT AFFECTED BY REVOCATION OF LETTERS OR REMOVAL OF FIDUCIARY AFTER SALE OR MORTGAGE MADE.

(d) Every sale made, and every deed or mortgage executed and delivered in pursuance of, and agreeably to the provisions of this section shall vest the property therein described in the grantee or mortgagee, as fully and effectually as if the same had been made, executed and delivered by all the fiduciaries to whom the authority to sell or mortgage was originally given.

NOTE.—This is copied from Section 16 (j) 4 of the Fiduciaries Act (see 444 *infra*).

200. EFFECT OF SALE, CONVEYANCE OR MORTGAGE.

(e) In all cases of sales or mortgages under the order of, or confirmed by the court, the title of the purchaser or mortgagee shall not be affected by the subsequent revocation of the letters testamentary or of administration of the executor or administrator making such sale or mortgage, or by the subsequent re-

moval of the executor, administrator, guardian or trustee making such sale or mortgage.

NOTE.—This is copied from Section 16 (j) 5 of the Fiduciaries Act (see 445 *infra*).

201. IRREGULARITY OR DEFECT IN ORIGINAL APPOINTMENT OF FIDUCIARY NOT TO AFFECT TITLE OF PURCHASER OR MORTGAGEE.

(f) Whenever, in pursuance of proceedings in the court of any county, any person therein described as a trustee, guardian, executor, administrator, or as standing in any other fiduciary relation to the parties interested, shall grant and convey or mortgage any real estate, in which proceedings security shall be duly entered by him or her, under the order or decree of the court, no irregularity or defect in his or her original appointment, or the absence of any proper qualification in respect thereto, shall affect the title of the grantee, purchaser or mortgagee or the liability of the sureties, but the same shall be as valid in all respects as if such irregularity or defect had not existed.

NOTE.—This is copied from Section 16 (j) 6 of the Fiduciaries Act (see 446 *infra*).

202. SALE OR MORTGAGE TO THE FIDUCIARY.

SECTION 18. Whenever any court, having jurisdiction under this act to decree a sale or mortgage of real estate, shall issue its order to any executor, administrator, guardian or trustee, specially appointed for the purpose or otherwise, to sell or mortgage such real estate, and shall, in any case within its jurisdiction, give authority to any executor, administrator, guardian or trustee, to bid at such sale, and shall confirm the sale to such fiduciary or shall authorize the making of such mortgage to any executor, administrator, guardian or trustee, the said court may make an order directing its clerk to execute a deed or mortgage, as the case may be, for said real estate to such purchaser or mortgagee, who shall give security and shall account for the amount of said purchase money or mortgage money, in the settlement of his accounts, to said court.

NOTE.—This is copied from Section 16 (k) of the Fiduciaries Act (see 447 *infra*).

203. REAL ESTATE IN THE SAME OR DIFFERENT COUNTIES,—WHERE WHOLLY IN ONE COUNTY.

SECTION 19. (a) In all proceedings under the provisions of this act, where the real estate shall lie wholly within one county, the petition shall be presented only in the court of that county.

NOTE.—This is a new clause in accordance with the proviso to Section 1 of the Price Act.

204. WHERE REAL ESTATE DIVIDED BY COUNTY LINE.

(b) When an application shall be made, under the provisions of this act, for the sale, mortgaging, leasing or other proceedings relating to real estate, through which real estate the line dividing two or more counties runs, the court of the county in which the mansion house is situated, or, if there be no mansion house, the court of the county where the principal improvements may be, or, if there be no improvements, the court of either county, may exercise jurisdiction as to the whole of such real estate, irrespective of the county line; and any such sale, mortgaging, leasing or other decree relating to real estate, shall be as effectual as if the whole of such real estate had been within the county whereof said court has jurisdiction. Notices of said proceedings, as required by this act, shall be given in all the counties in which the land is situated, and a certified copy of all proceedings shall be filed in the proper court of each county in which said land is situated. Any mortgage taken to secure the purchase money, or any part thereof, shall be duly recorded in each of the counties in which said lands lie, as required by law.

NOTE.—This is derived from Section 1 of the Act of May 28, 1915, P. L. 635, 6 Purd. 7286, supplementary to the Price Act. The last two sentences have been made uniform with the provisions of Section 16 (1) 2 of the Fiduciaries Act (see 449 *infra*).

205. PRIVATE SALES,—POWER TO AUTHORIZE OR DIRECT.

SECTION 20. (a) The courts of the several counties of this commonwealth, in all cases where, under the provisions of this act, such courts have power to order the sale of real estate, may authorize or direct a private sale, if, in the opinion of the court,

under all the circumstances, a better price can be obtained at private than at public sale, as where the interest shall be undivided, or for any other sufficient cause.

NOTE.—This is copied from Section 16 (m) 1 of the Fiduciaries Act (see 450 *infra*) and is intended to supersede so much of Section 4 of the Price Act as authorizes private sales.

206. OBJECTIONS TO SALES.

(b) Any party interested as heir, devisee or intending purchaser, or any legatee whose legacy is, by the express terms of the will, or by law, charged on such real estate, may appear and object to such private sale on account of the insufficiency of the price, and, if such objection be sustained, may offer to give or pay a substantial increase for such property, and the court, at its discretion, may thereupon authorize or direct such sale, or refuse to authorize or direct the same, and accept any substantially increased offer, and may authorize the sale of such property to such new bidder upon compliance with the conditions of sale and giving such security as shall be directed by the court; or, such party interested or legatee may appear as aforesaid and object to such sale on any legal or equitable grounds: *Provided*, That nothing herein contained shall be construed to affect the existing law with respect to objections to public sales.

NOTE.—This is modeled upon Section 16 (m) 3 of the Fiduciaries Act (see 452 *infra*).

Under this section of the Act, a third person, desirous of purchasing the property and willing to pay more than the price set forth in the petition may appear and object to the confirmation of the sale and it is the duty of the court to accept any substantially increased offer over that offered by the purchaser in the petition. In the absence of a rule of court to govern the procedure as a matter of practice, offers should be in writing accompanied by a certified check for the increase. It was never intended that the parties should make oral bids in open court. Mauch's Est., 47 Pa. C. C. 490, 67 P. L. J. 308, 16 North, 405, 33 York 45.

207. RETURN AND CONFIRMATION OF SALES.

SECTION 21. All public sales of real estate under the provisions of this act shall be subject to confirmation by said court; but in the case of private sales authorized or directed under the provisions of this act, no return or confirmation shall be necessary.

NOTE.—This is modeled upon Section 16 (n) of the Fiduciaries Act (see 453 *infra*).

208. DISCHARGE OF LIENS.

SECTION 22. All public sales of real estate under the provisions of this act shall have the effect of judicial sales as to the discharge of liens upon the real estate so sold; but private sales shall not discharge the liens of debt of record.

NOTE.—This section is substituted for the provision of Section 5 of the Price Act that “by every such public sale the premises sold shall be discharged from all liens,” and the provision of Section 2 of the supplementary Act of March 23, 1867, P. L. 43, 4 Purd. 4032, that private sales “shall discharge the premises sold from the lien of the debts of the decedent, except debts of record, and debts secured by mortgage; *Provided*, That the security, required” by the Price Act “shall have been duly entered.

209. NO OBLIGATION TO SEE TO APPLICATION OF PURCHASE-MONEY.

SECTION 23. Whenever a public or private sale of real estate shall be authorized, directed or confirmed by any court under the provisions of this act, the person or persons purchasing the real estate so sold and taking title in pursuance of the decree of the court, shall take such title free and discharged of any obligation to see to the application of the purchase-money.

NOTE.—This is copied from Section 16 (*p*) of the Fiduciaries Act. (See 455 *infra*.)

210. APPEALS.

SECTION 24. In all cases and proceedings under this act, appeals may be taken to the proper appellate court from the orphans' court, as now provided by law in other cases, and from the court of common pleas, as provided in equity cases: *Provided*, That if any decree be carried into execution before the appeal be perfected, and written notice thereof given to any vendee, mortgagee, or lessee, any reversal thereof shall not affect the right or title of such vendee, mortgagee, or lessee, but the purchase or mortgage moneys or rents shall stand in lieu of the premises sold or mortgaged, or leased, so far as thus encumbered: *Provided, further*, That before any decree be carried into effect to afford such indemnity, twenty-one days be allowed from its entry to take and perfect such appeal.

NOTE.—This is Section 8 of the Price Act, 4 Purd. 4028, modified by substituting “proper appellate” for “supreme,” and by omitting, after “equity cases” the words “in the respective counties of the state.” In the

second proviso, the period has been made twenty-one instead of twenty days, to correspond with the period fixed by the general appeals act.

211. SHORT TITLE.

SECTION 25. This act shall be known and may be cited as the Revised Price Act of 1917.

212. REPEALER.

SECTION 26. The following acts and parts of acts of assembly are repealed as respectively indicated. The repeal of the first section of an act shall not repeal the enacting clause of such act.

Section 10 of an act entitled "An Act supplementary to the several acts of this commonwealth concerning partitions, and for other purposes therein mentioned," approved April 7, 1807, P. L. 155, absolutely.

Section 2 of an act entitled "A supplement to the intestate law of this commonwealth," approved April 8, 1826, P. L. 255, absolutely.

Section 1 of an act entitled "An Act supplementary to the various acts relating to orphans' and registers' courts, and executors and administrators, and the act relating to the measurement of grain, salt, and coal," approved June 16, 1836, P. L. 682, absolutely.

Section 2 of an act entitled "A supplement to an act, entitled 'An Act relating to orphans' court,' approved the twenty-ninth of March, one thousand eight hundred and thirty-two," approved March 16, 1847, P. L. 474, absolutely.

Sections 1 to 5, inclusive, of an act entitled "An Act supplementary to an act passed the twenty-ninth day of March, one thousand eight hundred and thirty-two, entitled 'An Act relating to orphans' courts,' and relating to contracts of decedents and escheats in certain cases, and relative to the district court of the city and county of Philadelphia, and to registers of wills," approved April 3, 1851, P. L. 305, absolutely.

Sections 1 to 8, inclusive, and Section 10 of an act entitled "An Act relating to the sale and conveyance of real estate," approved April 18, 1853, P. L. 503, absolutely.

Sections 1 and 3 of an act entitled "A supplement to an act, entitled 'An Act relating to the sale and conveyance of real estate,'" approved April 13, 1854, P. L. 368, absolutely.

Section 5 of an act entitled "An Act to amend certain defects

of the law for the more just and safe transmission and secure enjoyment of real and personal estate," approved April 27, 1855, P. L. 368, absolutely.

An act entitled "A further supplement to the act, entitled 'An Act relating to the sale and conveyance of real estate,' passed the eighteenth day of April, one thousand eight hundred and fifty-three," approved April 1, 1863, P. L. 187, absolutely.

An act entitled "Supplement to an act, entitled 'An Act relating to the sale and conveyance of real estate,' approved the eighteenth day of April, Anno Domini one thousand eight hundred and fifty-three," approved April 18, 1864, P. L. 462, absolutely.

An act entitled "A supplement to an act relating to the sale and conveyance of real estate, approved the eighteenth day of April, one thousand eight hundred and fifty-three," approved April 17, 1866, P. L. 108, absolutely.

Sections 1 and 2 of an act entitled "An Act relating to judicial sales, and the preservation of the lien of mortgages," approved March 23, 1867, P. L. 43, absolutely.

An act entitled "A further supplement to an act, entitled 'An Act relating to the sale and conveyance of real estate,' approved the eighteenth day of April, Anno Domini, one thousand eight hundred and fifty-three, authorizing the courts to decree the leasing and combination of lands for mining purposes," approved June 8, 1874, P. L. 277, absolutely.

Section 1 of an act entitled "An Act to amend the second section of an act, entitled 'An Act relative to the sale and conveyance of real estate,' approved the eighteenth day of April, one thousand eight hundred and fifty-three, extending the provisions thereof to real estate upon which are limited vested remainders which are liable to open and let in after born children, and validating sales of real estate heretofore made by proceedings under said act of lands and tenements subject to such remainders," approved June 14, 1897, P. L. 144, absolutely.

Sections 1 and 2 of an act entitled "An Act authorizing the several orphans' courts of this commonwealth to decree the sale, mortgaging, leasing or conveyance upon ground-rent, of lands devised or held with remainder to a class of persons, some or all of whom are unborn, and to validate certain sales and conveyances heretofore made by decree of court in such cases," approved June 15, 1897, P. L. 159, absolutely.

An act entitled "An Act amending an act approved April seven-

teenth, one thousand eight hundred and sixty-six, entitled 'A supplement to an act relating to the sale and conveyance of real estate,' approved the eighteenth day of April, one thousand eight hundred and fifty-three; providing that deeds may be acknowledged before any justice of the peace, notary public, or other officer having authority to take acknowledgment of deeds or other instruments of writing," approved April 22, 1903, P. L. 241, absolutely.

An act entitled "An Act relating to acknowledgments of deeds; authorizing county treasurers, county commissioners, sheriffs, executors, administrators, trustees, or other persons acting in an official or representative capacity, where now required or authorized to make acknowledgment of deeds or other instruments before justices of the peace, to make acknowledgments of deeds and other instruments before a notary public, or any officer authorized by law to take acknowledgments of deeds, and validating all such acknowledgments heretofore made before other officers than justices of the peace," approved April 23, 1909, P. L. 156, in so far as it relates to acknowledgments of deeds or other instruments made in pursuance of decrees entered under the provisions of this act.

An act entitled "An Act authorizing the several orphans' courts to empower guardians of the estates of minors to join with the cotenants of said minors in effecting amicable partition of lands held in common," approved May 23, 1913, P. L. 345, absolutely.

An act entitled "A supplement to an act approved the eighteenth day of April, one thousand eight hundred fifty-three, entitled 'An Act relating to the sale and conveyance of real estate,'" approved May 28, 1915, P. L. 635, absolutely.

All other acts of assembly, or parts thereof, that are in any way in conflict with this act, or any part thereof, are hereby repealed.

THE WILLS ACT

of

June 7, 1917, (P. L. 403.)

PRELIMINARY NOTE BY COMMISSION.

The present law on this subject has proved so satisfactory that the Commissioners have recommended few changes of a fundamental nature. The law, however, has been codified, revised, and arranged in logical form. Some important changes should, however, be indicated.

In Section 2, it is provided that the presence of dispositive words after the signature of a testator shall not, even if they are written before the execution of the instrument, invalidate that which precedes the signature.

In Section 6, the period before death when a will for religious or charitable uses may be executed has been made thirty days instead of a calendar month.

In Section 8, the appointment of testamentary guardians is regulated and the rights of father and mother rendered more uniform.

In Section 15, the law on the subject of lapsed legacies and devises has been revised and the phraseology of existing statutes amended, especially in cases where the lapse occurs in the residuary clause or bequest and an intestacy results under the present law. According to the revised act, the lapsed share will pass to the other residuary legatees or devisees.

In Section 16, the rights of adopted children are extended to cases of a general devise or legacy to children when the contrary intention does not appear by the will.

In Section 17, provision is made for the payment of pecuniary legacies from real estate not specifically devised, when no contrary intention appears in the will.

In Section 18, it is provided that a devise of mortgaged real estate shall in all cases be subject to the mortgage and that the mortgage shall not be paid from the personal estate in the absence of a direction to that effect.

In Section 19, it is provided that in the case of so-called spendthrift trusts, the income of the cestui que trust shall, notwith-

standing, be liable for the support and maintenance of his wife and minor children.

In Section 21, it is provided that the marriage of a testatrix shall operate to revoke her will only pro tanto and not absolutely, thus rendering the law uniform with that regulating the subject in the case of men.

In Section 22, corresponding to Section 23 of the Intestate Act, it is provided that no murderer shall be entitled to take under the will of the person whom he has killed.

In Section 23, the rights of a surviving husband and wife, electing to take against the will of the deceased spouse, are made uniform, as has already been indicated in the Preliminary Note to the Intestate Act; and the procedure relative to such election has been revised and defined with greater particularity.

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213. TITLE.**AN ACT.**

Relating to the form, execution, revocation and interpretation of wills, to nuncupative wills, to the appointment of testamentary guardians, to spendthrift trusts, to forfeiture of devise or legacy in case of murder of testator, to elections to take under or against wills, and to the recording and registering of such elections and of decrees relative thereto and to the fees therefor.

214. WHO MAY MAKE WILLS AND WHAT MAY BE DISPOSED OF.

SECTION 1. Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same, That every person of sound mind and of the age of twenty-one years or upwards, whether married or single, may dispose by will of his or her real estate, whether such estate is held in fee simple or for the life or lives of any other person or persons, and whether in severalty, joint tenancy or common, and also of his or her personal estate.

NOTE.—This is Section 1 of the Act of April 8, 1833, P. L. 249, 4 Purd. 5109-18, amended by inserting the words, “of the age of twenty-one years or upwards, whether married or single.” This obviates the necessity for a separate section as to minors, thus supplying Section 3 of the Act of 1833, 4 Purd. 5120. It also supplies Section 7 of the Act of April 11, 1848, P. L. 537, 4 Purd. 5119 (which supplied Section 2 of the Act of 1833) providing that a married woman might dispose of her separate property by will executed in the presence of two or more witnesses, neither of whom should be her husband. It likewise supplies Section 5 of the Act of June 8, 1893, P. L. 345, 4 Purd. 5119, empowering married women to make wills as if unmarried, which act repealed the married persons’ property act of June 3, 1887, P. L. 332.

The provision in Section 1 of the Act of 1833 as to estates held for the lives of others was copied from the Statutes of 29 Charles II, Chapter 3, Section 12; and the provision as to joint tenancy followed the Act of March 31, 1812, 5 Sm. L. 395, 2 Purd. 2031, which provided that if partition be not made between joint tenants, the parts of those who die first shall not accrue to the survivors, but shall descend or pass by devise, and be considered to every intent and purpose in the same manner as if such deceased joint tenants had been tenants in common.

Apropos of a suggestion that the testamentary age be reduced to eighteen years, it may be noted that in the draft submitted by the Commissioners in 1832, it was provided that wills of personal estate alone might be made by persons of the age of eighteen years or upwards, but this was not approved by the legislature.

215. FORM AND EXECUTION OF WILLS.

SECTION 2. Every will shall be in writing, and unless the person making the same shall be prevented by the extremity of his last sickness, shall be signed by him at the end thereof, or by some person in his presence, and by his express direction; and in all cases, shall be proved by the oaths or affirmations of two or more competent witnesses, otherwise such will shall be of no effect: *Provided*, That the presence of dispositive or testamentary words or directions, or the appointment of an executor or the like, after the signature to a will, whether written before or after the execution thereof, shall not invalidate that which precedes the signature.

NOTE.—This is Section 6 of the Act of 1833, 4 Purd. 5120-26, with the addition of the proviso.

The Commissioners in 1832 remarked that it was then the law of Pennsylvania that real or personal property might be transferred by a will without signature, seal or attesting witness, and although the will was not in the handwriting of the testator. Their draft of Section 6 was passed without alteration except that, after the words "shall be proved" there were omitted the words "before the register having jurisdiction thereof."

In the Laws Agreed upon in England, 5 Sm. L. 416, Section 15, it was provided that: "All wills and writings, attested by two witnesses, shall be of the same force as to lands, as other conveyances, being legally proved within forty days, either within or without the said province."

The Act of 1705, 1 Sm. L. 33, "concerning the probates of written and nuncupative wills, and for confirming the devises of lands," was largely derived from the Statute of 29 Charles II, Chapter 3, but omitted Sections 5 and 6 of that statute, which prescribed the forms of execution and revocation of wills of lands. Section 1 of the Act of 1705 provided "That all wills in writing, wherein or whereby any lands, tenements or hereditaments, within this province, have been, are, or shall be devised (being

proved by two or more credible witnesses, upon their solemn affirmation, or by other legal proof in this province, or being proved in the Chancery in England, etc.) shall be good and available in law, for the granting, conveying and assuring of the lands or hereditaments thereby given or devised, as well as of the goods and chattels thereby bequeathed."

The first part of the section as now reported is copied from the present law. Its language is vague, if it be literally interpreted, but its meaning has been so often elucidated by the decisions of the courts that the Commissioners have felt it to be unwise to remould it, and, for the sake of achieving technical clarity of expression, raise new questions which would excite litigation. The Commissioners are not aware that any change is demanded as to the execution and proof of wills, and have purposely avoided the requirement of subscribing witnesses, which in many other jurisdictions is the rule. It is desirable that the laws should be as simple and free from technicality as possible, and if subscribing witnesses were necessary many wills would be unjustly avoided. Our present law has proved very satisfactory in this regard, and an innovation does not appear to be advisable.

The Commissioners, however, recommend in the proviso to this section a change induced by the decision in *Wineland's Appeal*, 118 Pa. 37. The legislative requirement that a will shall be signed at the end thereof, the natural and proper place for the signature, was a judicious improvement upon the law as it previously existed; but the Commissioners are of opinion that the presence of testamentary provisions after the signature, even if written before the signature is affixed, should not invalidate what the testator by his signature has authenticated.

See forms 3, 5-8, 36-7. See *Seiter's Est.*, 265 Pa. 202; 108 Atl. 614.

Proof of a lost will is made out only by proof, by two witnesses of execution and of contents, each of which must separately depose to all the facts necessary to complete the chain of evidence so that no link in it may depend on the credibility of one. Where a reputable scrivener prepared a will which was signed by decedent in the presence of two witnesses, who had no knowledge of its contents and the will was subsequently lost the testimony of the scrivener alone as to its contents was held by the court insufficient. "The two witness rule is sound; by permitting one witness to establish the contents of a lost will, the door would be opened to intriguing and designing persons after which misfortune must necessarily follow; and, while, by such latter rule a disappointed heir may be discouraged from destroying a will, dishonesty, fraud and criminal wrong would be greatly encouraged. If a will, properly executed, is lost, and the one-witness rule should prevail, it would permit a scrivener to write the will after his own fashion, diverting the estate into channels never dreamed of by the testator, disinheriting heirs, and denying, to those close to him throughout life, the benefits of his bounty. Where two witnesses to the contents are required, the opportunity for engrafting bogus wills on estates, or for dishonesty in scriveners who write wills, or other fraud in connection therewith, if not made impossible, is greatly lessened." *Hodgson's Est.*, 270 Pa. 210; 112 Atl. 778.

Where testator accidentally destroyed his will and though intending to do so, never re-wrote it, its contents cannot be shown until its execution has been proved by the testimony of two witnesses. Where such witnesses have no knowledge of the contents of the will and the only other evidence is that of the man who drew the will who testified that he had left it with decedent, who told him that he had signed it in the presence of two witnesses, the evidence of the execution of the will is insufficient. *Weber's Est.*, 12 Berks 12; affirmed in 268 Pa. 7; 110 Atl. 785.

While the presumption is, in the absence of proof, that words appearing in a will following the signature were written after the signature, yet under the act of 1917 they are without effect and a widow given a fee in the will did not have her estate cut down to a life estate by the addition of the words "here life time" after the signature. *Wilson v. Cook*, 49 Pa. C. C. 16.

A scrawl or mark made by the testatrix, identified by two witnesses both of whom saw her "sign" the will and one of whom was a subscribing witness, was held a sufficient execution by *Lamorelle*, P. J. in *Kris' Est.*, 30 Dist. 166.

On the other hand, *Miller, J.*, of the Orphans' Court of Allegheny County, set aside the probate of a will where it appeared that the testatrix signed her name by making a series of unintelligible marks which were witnessed by two subscribing witnesses, on the ground that the act is mandatory and requires that the testatrix's name must appear written by someone in her presence and by her direction and authority. *Perry's Est.*, 67 P. L. J. 216.

216. EXECUTION OF WILLS BY MARK OR CROSS.

SECTION 3. If the testator be unable to sign his name, for any reason other than the extremity of his last sickness, a will to which his name is subscribed in his presence, by his direction and authority, and to which he makes his mark or cross, unless unable so to do, in which case the mark or cross shall not be required, shall be as valid as though he had signed his name thereto: *Provided*, That such will shall be proved by the oaths or affirmations of two or more competent witnesses.

NOTE.—This is substituted for Section 1 of the Act of January 27, 1848, P. L. 16, 4 *Purd.* 5126-7, omitting the provisions as to wills theretofore made.

Section 1 of the Act of 1848 reads as follows.

"Every last will and testament heretofore made or hereafter to be made, excepting such as may have been finally adjudicated, prior to the passage of this act, to which the testator's name is subscribed, by his direction and authority, or to which the testator hath made his mark or cross, shall be deemed and taken to be valid in all respects, *Provided*, The other requisites under existing laws are complied with."

This phraseology is clearly open to criticism, as it might be understood to mean that a will, signed by the direction of the testator, although not in

his presence, and although he was not in the extremity of his last illness, would be good, which, of course, would be inconsistent with the preceding requirements.

The Commissioners are of opinion that this section of the Act of 1848 should be corrected in its phraseology, as an exception to their general method of revision, for its reformation, unlike that of Section 6 of the Act of 1833, last preceeding, is not complicated by any long series of judicial decisions; and it seems desirable to clarify its language before any questions such as have been suggested may arise.

The new section is intended to cover cases where a person is unable to sign his name, whether from lack of education or from physical weakness. The provision that the mark may be dispensed with if the testator be unable to make a mark is intended to cover such a case as that of a man who lost both arms or is paralysed.

See form 4.

The probate of a will was set aside where it appeared that the testatrix signed her name by making a series of unintelligible marks which were witnessed by two subscribing witnesses, on the ground that this section of the act is mandatory and requires that the testatrix's name must appear written by someone in her presence and by her direction and authority. *Perry's Estate*, 67 P. L. J. 216.

But see *Kris' Est.*, 30 Dist. 166.

217. NUNCUPATIVE WILLS.

SECTION 4. Personal estate may be bequeathed by a nuncupative will, under the following restrictions:

218. WHEN AND WHERE TO BE EXECUTED.

(a) Such will shall in all cases be made during the last sickness of the testator, and in the house of his habitation or dwelling, or where he has resided for the space of ten days or more, next before the making of such will; except where such person shall be surprised by sickness, being from his own house.

NOTE.—This is clause 1 of section 7 of the Act of 1833, 4 *Purd.* 5127, omitting at the end the words “and shall die before returning thereto.” These words seem unnecessary and might invalidate a nuncupative will made in a hospital should the testator be removed to his own home before death.

Section 7 of the Act of 1833 was derived from Section 3 of the Act of 1705, 1 *Sm. L.* 33, the changes made by the Commissioners of 1830 being the substitution in clause (b) of \$100 for £30, and the placing of this limitation in the second clause instead of the first.

The Act of 1705 was derived from the Statute of 29 Charles II.

219. REQUISITES WHERE BEQUEST IS OVER ONE HUNDRED DOLLARS.

(b) Where the sum or value bequeathed shall exceed one hundred dollars, it shall be proved that the testator, at the time of

pronouncing the bequest, did bid the persons present, or some of them, to bear witness that such was his will, or to that effect; and in all cases, the foregoing requisites shall be proved by two or more witnesses, who were present at the making of such will.

NOTE.—This is clause 11 of Section 7 of the Act of 1833, 4 Purd. 5128. See the note to clause (a).

220. PROOF AFTER EXPIRATION OF SIX MONTHS.

(c) No testimony shall be received to prove any nuncupative will after six months elapsed from the speaking of the alleged testamentary words, unless the said testimony, or the substance thereof, were committed to writing within six days after the making of said will.

NOTE.—This is Section 11 of the Act of March 15, 1832, P. L. 137, 4 Purd. 5128, which was derived from Section 4 of the Act of 1705, 1 Sm. L. 33, with merely verbal changes. In line 3, "alleged" has now been substituted for "pretended," as being more in conformity with the modern use of the words.

221. WILLS OF MARINERS AND SOLDIERS.

SECTION 5. Notwithstanding this act, any mariner being at sea, or any soldier being in actual military service, may dispose of his movables, wages and personal estate, as he might have done before the making of this act.

NOTE.—This is Section 8 of the Act of 1833, 4 Purd. 5128, which was copied from Section 7 of the Act of 1705, 1 Sm. L. 33. There were omitted however, in the Act of 1833, the words, "or person" after "mariner," and the words, "or they" after "as he." The Commissioners of 1830 remarked, in reference to the change thus made: "By extending the provisions to all other *persons* at sea it is conceived that there would be some danger of those evils in respect to the disposition of property by verbal wills against which it was the object of a previous section to guard."

Under the present law and the decisions of the courts, mariners at sea and soldiers in actual military service have the same privileges in the making of wills that they would have enjoyed if the English Statute of Frauds and our Acts of 1705 and 1833 had never been passed, as all of these statutes have expressly excluded such wills; the wills, though oral, must however be proved by two witnesses: *Smith's Will*, 6 Phila. 104; *Drummond vs. Parish*, 3 Curteis Ecc. 522.

While the Commissioners are aware of the dangers attending oral wills, they have concluded to recommend the exception here made in favor of mariners and soldiers, as a class of persons who have always been regarded with peculiar indulgence by the law of England as well as by the Roman law, in which this exception originated.

Nuncupative wills in general have been so safeguarded by the requirements of the preceding sections, that the Commissioners do not believe that any serious consequences will ensue from their retention. Such wills seldom occur in practice, and yet their total abolition might produce inconvenience in cases proper for them.

Wills of mariners at sea and soldiers in actual military service are not subject to the provisions of the Wills Act of 1917, being excepted from the operation of that and previous statutes, but are governed by the common law under which a will of personal property by word of mouth was valid, made by a boy over fourteen years of age, although a minor. *Henninger's Est.*, 30 Dist. 413. (Note; This case contains a most exhaustive and learned dissertation on the subject of nuncupative wills and the wills of mariners at sea and soldiers in active service.)

222. BEQUESTS AND DEVISES FOR RELIGIOUS AND CHARITABLE USES.

SECTION 6. No estate, real or personal, shall be bequeathed or devised to any body politic, or to any person in trust, for religious or charitable uses, except the same be done by will attested by two credible, and, at the time, disinterested witnesses, at least thirty days before the decease of the testator; and all dispositions of property contrary hereto shall be void, and go to the residuary legatee or devisee, heirs or next of kin, according to law. A disinterested witness, within the meaning of this section, is a witness not interested in such religious or charitable use, this section not being intended to apply to a witness interested in some other devise or bequest in the same instrument.

NOTE.—This is Section 1 of the Act of June 7, 1911, P. L. 702, 7 Purd. 7766, altered so as to apply to wills only, and by transferring the definition of "a disinterested witness" to the end of the section. Another statute should be passed relating to gifts otherwise than by will, so as to make the law uniform. The Act of 1911 amended Section 11 of the Act of April 26, 1855, P. L. 332, 1 Purd. 595, 4 Purd. 5129, by adding the definition of a disinterested witness, which has been construed by the supreme court in *Paletthorp's Estate*, 249 Pa. 411.

Much might perhaps be said in favor of the abolition of the prohibition of bequests and devises for charitable and religious uses made within any definite period of time before the death of the testator. The Commissioners have concluded to make no recommendations on this subject to the Legislature. They have, however, substituted for the period of one calendar month, that of thirty days, for the reason that the calendar months of the year do not contain the same number of days, and the provision should be uniform.

Decedent died October 13, 1918, leaving a will dated Oct. 11, 1918, with a devise of a remainder interest in real estate to a charity in default of issue to the life tenant and Gest, J., held: "As the testatrix died within thirty days after the execution of her will, the charitable bequests and devises are void" under this section of the act. *McNulty's Est.*, 29 Dist. 709.

A bequest in trust to use the income for the care of a cemetery lot is a charitable bequest under the Act of May 26, 1891 (P. L. 119), and is void where testator died less than thirty days after making his will under Section 6 of the Wills Act of 1917. *Eby's Est.*, 30 Dist. 338, 37 Lanc. 329. See *Channon's Est.*, 28 Dist. 479 affirmed in 266 Pa. 417, 109 Atl. 756.

223. EMBLEMENTS, CROPS, RENTS AND PERIODICAL PAYMENTS ACCRUING TO TENANTS FOR LIFE AND OTHERS.

SECTION 7. The emblements or crops growing on lands held by a widow in dower, or by any tenant for life, may be disposed of by will as other personal estate. Rents and other periodical payments accruing to any tenant for life, or to any other person entitled under the laws of this commonwealth regulating the descent and partition of real estate, may, so far as the same may have accrued on the day of death of such tenant for life, or other person, be disposed of by will, in like manner.

NOTE.—This is Section 5 of the Act of 1833, 4 Purd. 5120, with one change. The draft prepared by the Commissioners in 1832 read, "The emblements *or* crops." The Act of 1833 reads, "The emblements *of* crops." The Act of 1833 reads, "The emblements *of* crops." This is evidently a clerical or typographical error. The original reading is restored.

The Commissioners in 1832 reported that they had incorporated in Section 5 a part of the Statute of 20 Henry III, Chapter 2, relating to widows, and added a power to all life tenants to dispose of by will of crops, rents, etc.

224. TESTAMENTARY GUARDIANS APPOINTED BY FATHER.

SECTION 8. (a) Every person competent to make a will, being the father or adopting father of any minor child unmarried, may appoint a testamentary guardian for such child during his or her minority, or for any shorter period: *Provided*, That such testamentary guardian shall not be entitled to the custody of the person of such child unless the mother or adopting mother, if surviving, shall relinquish such custody, or unless the best interests of the child shall require that such surviving mother or adopting mother should not retain the custody of the person of such child.

NOTE.—This is founded on Section 4 of the Act of April 8, 1833, 4 Purd. 5151, as amended by the Act of April 15, 1915, P. L. 124, 7 Purd. 7767. It is altered so as to distinguish between guardianship of the person and of the estate, giving the father the right to appoint a guardian but making the question of the custody of the person depend upon the consent of the mother and the best interests of the child. Provisions to include adopted children have been added.

The provision as to appointment of a guardian by the mother is omitted from this clause and covered by the next.

The specific inclusion of adopted children in this section of the act was held to be persuasive of an intent not to include adopted children within the purview of Section 21 of the Wills Act so as to revoke a will as to those adopted since its making by the adopting parent. *Boyd's Est.*, 50 Pa. C. C. 163, 10 West., 47, affirmed in 270 Pa. 504.

Under this section a grandparent has no authority to appoint a testamentary guardian for his grandchild. The act gives no persons other than the parents, natural or adopting, such power to appoint a testamentary guardian. But where such grandparent appoints by his will a certain person as "guardian" of a grandchild who is made a beneficiary, "hereby empowering him to have full power and authority to receive the said bequests," such appointee will be considered as a trustee for the purposes expressed in the will and as such will be entitled to the control of the bequests to the exclusion of a lawfully appointed guardian, who, however, has standing to compel the trustee to enter security or do such other things as in the opinion of the court may be necessary for the protection of the minor's estate. *McLain's Est.*, 1 Wash. 220.

225. APPOINTMENT BY MOTHER.

(b) Every person competent to make a will, being the mother or adopting mother of any minor child unmarried, may appoint a testamentary guardian for such child during his or her minority, or for any shorter period, whenever the father or adopting father of such child shall be deceased and has not appointed such a guardian. Such mother or adopting mother, who shall leave to such child an estate, either real or personal, may appoint a testamentary guardian for such estate of the child, whether the father or adopting father of such child shall be living or dead, and whether he shall or shall not have appointed a testamentary guardian for such child. *Whenever the father or adopting father of such child has for one year or upwards, immediately preceding the death of the mother or adopting mother, wilfully neglected or refused to provide for such child, such mother or adopting mother, who shall leave to such child an estate, either real or personal, may appoint a testamentary guardian for such child.**

*The portion in italics was added by the amendatory Act of June 12, 1919, (P. L. 443.)

NOTE:—This is founded on Sections 1 and 2 of the Act of June 10, 1881, P. L. 96, 4 Purd. 5152; the Act of April 15, 1915, P. L. 124, 5 Purd. 5887; and the Act of April 21, 1915, P. L. 145, 5 Purd. 5887, and involves the repeal of these acts.

The language of the Act of April 15, 1915, giving to "the father or the mother" the right to devise the custody of a minor child in all cases, leaves it doubtful whether, the father having died appointing a guardian, the mother may also appoint a general guardian by her will, and *vice versa*.

Provisions to include adopted children have been added. The provision that a mother, appointed guardian by her husband's will, may appoint a successor, has been omitted as unnecessary.

The specific inclusion of adopted children in this section of the act was held to be persuasive of an intent not to include adopted children within the purview of Section 21 of the Wills Act so as to revoke a will as to those adopted since its making by the adopting parent. *Boyd's Est.*, 50 Pa. C. C. 163, 10 West. 47, affirmed in 270 Pa. 504.

Under this section a grandparent has no authority to appoint a testamentary guardian for his grandchild. This act gives no persons other than the parents, natural or adopting, such power to appoint a testamentary guardian. But where such grandparent appoints by his will a certain person as "guardian" of a grandchild who is made a beneficiary, "hereby empowering him to have full power and authority to receive the said bequests," such appointee will be considered as a trustee for the purposes expressed in the will and as such will be entitled to the control of the bequest to the exclusion of a lawfully appointed guardian, who, however, has standing to compel the trustee to enter security or do such other things as in the opinion of the court may be necessary for the protection of the minor's estate. *McLain's Est.*, 1 Wash. 220.

226. FORFEITURE OF RIGHT BY NEGLECT OF PARENTAL DUTY.

(c) No father who shall have, for one year or upwards previous to his death, wilfully neglected or refused to provide for his child or children, and no mother who shall have, for a like period, deserted her child or children or failed to perform her parental duties, shall have the right to appoint any testamentary guardian for such child or children.

NOTE.—This is Section 6 of the Act of May 4, 1855, P. L. 431, 4 Purd. 5152, omitting the words "as aforesaid" before the words "for one year or upwards," and adding a corresponding provision as to the mother. Section 1 of the act of May 25, 1887, P. L. 264, 4 Purd. 5152, giving the mother a right to appoint a guardian in case of desertion by the husband, is superseded by clause (b) *supra*, and should be repealed.

227. WILLS TO BE CONSTRUED AS IF EXECUTED IMMEDIATELY BEFORE THE DEATH OF THE TESTATOR.

SECTION 9. Every will shall be construed, with reference to the real and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will.

NOTE:—This is Section 1 of the Act of June 4, 1879, P. L. 88, 4 *Purd.* 5144, which was declaratory of the common law rule as to personal property, and was copied from the statute of 7 William IV and 1 Vict., Chapter 26, Section 24; 8 *Rev. Stat.* 34.

The Act of 1879 "was enacted to complete what had only been partially effected by the Act of 1833." Opinion of Clark, J., in *Fidelity Ins. T. & S. D. Co.'s Appeal*, 108 Pa. 492, 499. See also, *Williams v. Brice*, 201 Pa. 595, 597.

Under the Act of June 4, 1879, P. L. 88 and this section of the Wills Act, the general rule is that a will speaks from the death of the testator, and legacies are to be satisfied out of the property which he owns at that time. This rule does not apply where a contrary intention appears by the will, as, for example, where the testator is the owner of a particular thing at the time of the making of his will, and bequeaths it by language which shows that he intends the gift to apply alone to the particular thing. The legacy is then called "specific" and where, prior to his death, the testator has disposed of the subject matter, the legacy is adeemed and nothing passes under the gift. Thus, where testator, at the time of the execution of his will, was the owner of a yacht, which he bequeathed as follows: "I give and bequeath unto my nephew, my yacht, with all its furnishings," and subsequently he sold the yacht, and later purchased a one-third interest in another yacht, which he owned at the time of his death, it was held, that the language of the will clearly applied to the yacht which the testator owned at the time of the execution of the will, and, having disposed of it before his death, the legacy was adeemed. *Annear's Est.*, 29 *Dist.* 44.

228. AFTER ACQUIRED REAL ESTATE TO PASS BY GENERAL DEVISE.

SECTION 10. The real estate acquired by a testator after making his will shall pass by a general devise, unless a contrary intention be manifest on the face of the will.

NOTE.—This is Section 10 of the Act of 1833, 4 *Purd.* 5139, which is similar to Section 23 of the Statute of 7 William IV and 1 Vict., Chapter 26. It has been retained, although it might be considered unnecessary in view of the broader provisions of the Act of 1879, embodied in the last preceding section.

**229. GENERAL DEVISE OR BEQUEST TO OPERATE
AS EXECUTION OF GENERAL POWER OF
APPOINTMENT.**

SECTION 11. A general devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend, as the case may be, which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will. In like manner a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate or any personal estate to which such description shall extend, as the case may be, which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will.

NOTE.—This is Section 3 of the Act of 1879, 4 Purd. 5145-6. See the note to section 9 of the present draft.

Section 4 of the Act of 1879, 4 Purd. 5146, provides: "This act shall operate upon and go into effect as to the wills of all persons who shall die after the date of this act." This is covered by the general section of the present act fixing the time when the act shall go into effect. (See 252 *infra*.)

Under a will where one had a general power of appointment and it was held that he could appoint to certain persons or classes of persons in such shares as another person might nominate, the court dismissed exceptions to an adjudication by Gest, J., wherein he said:

"The power conferred by the will of Sarah Ann Duffy upon Rosalie Gertrude Wilson was a general power to appoint this property by her will to such person or persons and for such estate or estates as she should direct, limit and appoint, and, of course had Rosalie Gertrude Wilson designated certain hospitals by name as the beneficiaries, there could be no question that the power was validly exercised. A general power such as this approaches so near to absolute ownership that she might have appointed the estate to her executor to be disposed of as part of her own, and if she had failed to exercise the power specifically it would nevertheless, have been executed by force of the Wills Act of June 7, 1917, Section 11, P. L. 403, which re-enacted the Act of June 4, 1879, Section 3, (P. L. 88) 11, Duffy's Est., 49 Pa. C. C. 30, 29 Dist. 379.

The auditing judge (Gest, J.) said in his adjudication:

"Amelia R. Sparks died on November 2, 1914, leaving a will by the tenth paragraph of which she bequeathed to her trustees premises No. 21

Wood Street, Camden, N. J., forty shares of North Pennsylvania Railroad stock, five shares of Philadelphia Traction Company, and a \$1,000 bond of the Delaware and Bound Brook Railroad, in trust to pay the net income therefrom to her son, Edward K. Sparks, for the term of his natural life, and from and after his decease, to pay over, assign, and transfer the principal in such way and manner as he may by last will and testament direct, limit and appoint, or in default of appointment, to those who would be entitled to the same if he had died seized and possessed of the same intestate.

"And by the seventeenth paragraph of her will she provided as follows: 'I order and direct that all devises and bequests and all payments of income herein given shall, to the fullest extent permitted by the law, be transferred or paid free and clear of the debts, contracts, engagements, alienations and anticipations of any beneficiary, and free and clear of all levies, attachments, executions and sequestrations.'

"The account is filed of the stocks and bonds so bequeathed and awarded to the accountants by the adjudication of Anderson, J., on November 23, 1916, and schedule thereon, and is filed by reason of the death of Edward K. Sparks on December 10, 1920, so that the trust then terminated.

"Edward K. Sparks left him surviving a widow, Julia M. Sparks and a will dated November —, 1916, of which she is executrix and by which he provided: 'I direct that all my just debts and funeral expenses be paid as soon as conveniently may be after my decease.

"I give, devise and bequeath all of my estate, real and personal, unto my wife, Julia M. Sparks, absolutely, if she shall survive me, otherwise, I give and devise the same to my son, Charles Aplin Sparks.'

"The question presented is whether, under the will of Edward K. Sparks, executing the power of appointment given to him, the award of the principal of the trust estate should be made to Julia M. Sparks individually as the object of the power, or whether it should be made to Julia M. Sparks as executrix of the will of Edward K. Sparks."

And LAMORELLE, P. J., in dismissing exceptions, held inter alia:

"The three exceptions raise but one question: the propriety of awarding the appointed estate to the executrix of the will of the donee."

"In the present case the donee's exercise of the power is by virtue of Section 11 of the Wills Act of June 7, 1917, P. L. 415 (which repealed the Act of June 4, 1879, P. L. 88), in a will where, following a general direction to pay his debts, he left his estate to his wife.

"We cannot distinguish the cases, and, therefore, the exceptions are dismissed, without prejudice, however, to the rights of all parties in interest which are to be determined in manner and form as hereinbefore set forth." Spark's Est., 30 Dist. 815.

230. DEVISES OF REAL ESTATE TO PASS WHOLE ESTATE OF TESTATOR.

SECTION 12. All devises of real estate shall pass the whole estate of the testator in the premises devised, although there be

no words of inheritance or of perpetuity, unless it appear by a devise over, or by words of limitation, or otherwise, in the will, that the testator intended to devise a less estate.

NOTE.—This is Section 9 of the Act of 1833, 4 Purd. 5137-8. Before that Act, a devise did not carry a fee unless there were words of inheritance or other language showing an intention that a fee should pass. The Commissioners in 1832 reported that this section coincided with the improvement made in this respect in many other states.

See *Rosenfield v. Wahal*, 48 Pa. C. C. 362.

231. DEVISE OF REAL ESTATE IN FEE TAIL TO BE CONSTRUED AS ESTATE IN FEE SIMPLE.

SECTION 13. Whenever by any devise an estate in fee tail would be created according to the common law of this state, such devise shall be taken and construed to pass an estate in fee simple, and as such shall be inheritable and freely alienable.

NOTE.—This is Section 1 of the Act of April 27, 1855, P. L. 368, 2 Purd. 1485, altered so as to apply to wills only. The Act of 1855 should not be repealed so far as it relates to deeds.

232. CONSTRUCTION OF "DIE WITHOUT ISSUE" AND SIMILAR PHRASES.

SECTION. 14. In any devise or bequest of real or personal estate, the words, "die without issue," or "die without leaving issue," or "have no issue," or any other words which may import either a want or failure of issue of any person in his lifetime, or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by the will in which such devise or bequest is made.

NOTE.—This is Section 1 of the Act of July 9, 1897, P. L. 213, 4 Purd. 5146-8, altered so as to apply to devises and bequests only. The Act of 1897, so far as it relates to gifts and grants, is not to be repealed. Section 2 of that act, limiting its application to instruments made after its passage, is covered by Section 26 of the new act. (See 252 *infra*.)

See *English's Est.*, 270 Pa. 1, 112 Atl. 913.

"A careful reading of this act will at once disclose that it gave a statutory meaning to such words as 'die without issue' or 'die without leaving issue' or any words which may import either a want or failure of issue

of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, and that they shall be construed to mean a want or failure of issue in the lifetime or at the death of the taker, and not an indefinite failure of his issue, unless a contrary intention appear from the will. The statute has reference only to these two possible constructions of such words, viz: a failure of issue at the death of the taker or an indefinite failure, of his (the taker's) issue and has no reference to words which may imply a definite failure of issue either in the lifetime of the testator or at the death of the taker, the law of construction in the latter case has not been changed by this statute, and remains as it was before this act of assembly was passed." Fox, J., in *Segelbaum's Est.*, 24 Dauphin 274.

233. LAPSED AND VOID DEVISES AND LEGACIES DEVISE OR LEGACY IN FAVOR OF LINEAL DESCENDANTS NOT TO LAPSE BY DEATH.

SECTION 15. (a) No devise or legacy in favor of a child or children, or other lineal descendant or descendants of any testator, whether such children or descendants be designated by name or as a class, shall lapse or become void by reason of the decease of such legatee or devisee in the lifetime of the testator, if such devisee or legatee shall leave issue surviving the testator; but such devise or legacy shall be good and available in favor of such surviving issue, with like effect as if such devisee or legatee had survived the testator, unless the testator shall in the will direct otherwise.

NOTE.—This is Section 12 of the Act of April 8, 1833, P. L. 250, 4 *Purd.* 5142, which was founded on the Act of March 19, 1810, P. L. 96, 5 *Sm. L.* 112, modified so as to conform to the phraseology of the clause next following.

Section 12 of the Act of 1833 has been judicially construed to include legacies to children or grandchildren as a class, the principle of *Gross's Estate*, 10 Pa. 360, not having been applied to this section; see *Bradley's Estate*, 166 Pa. 300. The phraseology, however, has been changed by way of precaution in order to prevent any question upon the subject.

An adopted child of a son of testator was held entitled to distribution under the Wills Act of 1917, where the son died subsequent to the execution of the will, but prior to testator's death. The will provided: "All the rest and residue of my estate, of whatsoever nature and wheresoever situate, at the time of my decease, I give, devise and bequeath to my beloved children who are living at the date hereof, their heirs and assigns, share and share alike. The child or children of any of my children now living, but who die before me, to receive the share or portion, its or their parents would have received had he or she been living at the time of my death." "Issue," in Section 15 (a) and "child or children" in Section

16 (b) of the Wills Act of 1917 are necessarily synonymous in the restricted sense that their rights of inheritance are the same, and all that is required by the latter subsection is that "child or children shall be construed to include adopted children." This construction is necessary to carry into effect the clearly expressed legislative intent. *Hill's Estate*, 69 P. L. J. 177, 30 Dist. 477, s. c. 69 P. L. J. 348.

Testator left a will directing that this estate should be "equally divided among my children, their heirs and assigns." A son died before the testator leaving issue and a widow. *Held*, that the widow could not participate because not embraced within the words "heirs and assigns," which are words of limitation. *Schaeffer*, P. J., said: "By no authority known to the court have 'heirs and assigns' as here used, been construed as words of substitution and thus to embrace a widow as an heir. They are here used merely as words of limitation—they limit an absolute estate to children. As such, consequently, they preclude the widow's coming in on the legacy by substitution; and since the Wills Act of 1917, which saves the legacy from lapsing, restricts distribution of it to this son's issue, the court sees no way by which this widow can participate. For these reasons she will not be included in the distribution." *Wagenhorst's Estate*, 12 Berks 89.

See *Garnier v. Garnier*, 16 North 205; *Moore's Est.*, 30 Dist. 152, 68 P. L. J. 670, 15 Del. 367.

234. DEVISE OR LEGACY IN FAVOR OF BROTHERS AND SISTERS AND THEIR CHILDREN NOT TO LAPSE BY DEATH, IN CERTAIN CASES.

(b) Where any testator shall not leave any lineal descendants who would receive the benefit of any lapsed or void devise or legacy, no devise or legacy made in favor of a brother or sister, or of brothers or sisters of such testator, or in favor of the children of a brother or sister of such testator, whether such brothers or sisters or children of brothers or sisters be designated by name or as a class, shall be deemed or held to lapse, or become void by reason of the decease of such devisee or legatee in the lifetime of the testator, if such devisee or legatee shall leave issue surviving the testator; but such devise or legacy shall be good and available in favor of such surviving issue, with like effect as if such devisee or legatee had survived the testator, unless the testator shall in the will direct otherwise.

NOTE.—The Act of May 6, 1844, Section 2, P. L. 565, saved from lapse devises and legacies "made in favor of a brother or sister or the children of a deceased brother or sister of any testator, such testator not leaving any lineal descendants." It having been held in *Gross's Estate*, 10 Pa. 360, and *Guenther's Appeal*, 4 W. N. C. 41, that this act did not apply to a bequest to the legatees as a class, the Act of July 12, 1897, P. L. 256, 4 Purd. 5143-4, amended the Act of 1844 by expressly providing for class legacies.

The Act of 1897 also amended the law by striking out the word "deceased," so that the provisions of the act should apply to the children of brothers or sisters, whether or not their parent was deceased, a requirement which seems irrelevant.

The section as now reported follows the language of the Act of 1897, but further amends it by limiting it to cases where the testator "shall not leave any lineal descendants who would receive the benefit of any lapsed or void devise or legacy." This was probably the legislative intent, for the provision saving from lapse legacies to certain legatees should not depend upon the mere fact that the testator did not leave lineal descendants, unless those descendants would profit by the lapse or failure of the legacies. It was probably assumed by the legislature heretofore that if the testator left lineal descendants they would be included among his residuary devisees or legatees, and thus receive the benefit of the lapsed devises and legacies, but this is not necessarily the case.

The Commissioners have not deemed it expedient to recommend any further extension of the law in this regard. An examination of the statutes of other states discloses a great variety of legislative policy—some statutes going so far as to save every legacy from lapse where the legatee predeceases the testator. But statutes such as the present are really canons of construction, intended to carry out an assumed testamentary intent when it is not expressed, and there is great danger of carrying too far rules which import into a written will a meaning which is more or less artificial.

The term "issue" as used in this section of the Wills Act embraces adopted children. Schaeffer, P. J., *held*, "When the will was made, on November 12, 1917, giving a fourth share of the estate to the children of the deceased brother, Howard, Stanley Kirby, one of them, was living and had legally adopted as his son the said Raymond V. Kirby, as appears by the decree of the Court of Common Pleas of Lancaster County, dated January 30, 1915—almost two years before. It is to be assumed, therefore, that when she made her will, testatrix was aware of this adoption, and in any event, it is clear that Stanley Kirby, as one of the children of the deceased brother Howard, was at the date of the will a member of the class of children of the deceased brother Howard. * * * The question is, whether the term 'issue' in the act is meant to embrace adopted children. The court sees no reason for excluding them. To so exclude them, it seems, would be against the trend of all our late legislation. Under the Intestate Act of 1917, for example, adopted children are given equal rights of inheritance with other children, from and through whom they inherit. Here the legislative intent was clearly to put adopted children on the same plane as natural children; and this intent is further evidenced in the Act of June 20, 1919, P. L. 521, relating to inheritance taxes, where adopted children for purposes of direct taxation are put in the same class as natural children; or in other words, are not regarded as collaterals. So, in Section 16, Clauses (a) and (b) of the Wills Act of 1917; and so running through all our late acts of assembly. Why, therefore, this adopted child of Stanley Kirby should be denied the right of

his father's legacy here in view of all the legislation on the subject, is not clear to the court; and until some authoritative utterance making the reason clear, has been presented, Raymond V. Kirby will be allowed to participate in this distribution as the child of the deceased nephew, Stanley." *Moore's Estate*, 30 Dist. 152, 68 P. L. J. 670, 15 Del. 367.

Decedent died in March, 1918, and by her will disposed of the residue of her estate as follows: "That the same shall be divided, share and share alike, amongst all my nephews and nieces, having children or bodily heirs (that is to say, that such nephews and nieces having no children shall not inherit under this will)." *Held*, that a nephew dying before the date of the will never became a member of the class and his children cannot participate; that the children of a niece dying after the date of the will participate; and that the granddaughter of a deceased nephew within the class takes the share of her parent, since the Wills Act of 1917 does not limit to children the right to take the share of a deceased legatee, but uses the broader term "issue." *Fetherolf's Est.*, No. 2, 29 Dist. 479, 12 Berks 62.

Where by the second clause of her will, the testatrix provided:

"I give, devise and bequeath all my estate of whatsoever and where-soever situate unto my sister Margaret Boeshore, wife of Miller Howard Boeshore, and my brother John Frederick W. Stock, in equal shares," the court *held*, "Under the second section of the will, if it stood alone, John Frederick W. Stock would take one-half of the estate, and although Margaret Boeshore predeceased the testatrix, she left issue, John Jacob Boeshore, who would take his mother's share, the other one-half, under the Wills Act of June 7, 1917, Sec. 15 (b), P. L. 403." *Stock's Est.*, 49 Pa. C. C. 203, 29 Dist. 376.

See *Garnier v. Garnier*, 16 North 205.

235. LAPSED AND VOID DEVISES AND LEGACIES TO FALL INTO RESIDUE; PROVISIONS WHERE SUCH LEGACIES AND DEVISES ARE CONTAINED IN RESIDUARY CLAUSE.

(c) Unless a contrary intention shall appear by the will, such real or personal estate or interests therein as shall be comprised or intended to be comprised in any devise or bequest in such will contained, which shall fail or be void by reason of the death of the devisee or legatee in the lifetime of the testator, or by reason of such devise or bequest being contrary to law or otherwise incapable of taking effect, or which shall be revoked by the testator, shall be included in the residuary devise or bequest, if any, contained in such will. In any case where such devise or bequest, which shall fail or be void or shall be revoked as aforesaid, shall be contained in the residuary clause of such will, it shall pass to and be divided among the other residuary devisees or legatees, if any there be, in proportion to their respective interests in such residue.

NOTE.—This is Section 2 of the Act of June 4, 1879, P. L. 88, 4 Purd. 5145, amended so as to make it plain that it applies to personal as well as real estate, by including revoked devises and bequests, and by the addition of the last sentence.

This, like the other sections of the Act of 1879, was founded on the English Statute of 7 William IV and 1 Vict., Chapter 26.

According to the present law, residuary gifts which are void or fail by lapse pass to the next kin or heirs and not to the other residuary legatees or devisees. The Supreme Court in *Gray's Estate*, 147 Pa. 67, 75, criticized this rule as wrong in principle and subversive of the great canon of construction, viz, the carrying out of the intent of the testator.† In *Gorgas's Estate*, 166 Pa. 269, the rule was followed in a case where it was apparent from the language of the will that the testatrix intended not to give the next of kin any interest in her estate. And in *Waln's Estate*, 156 Pa. 194, the rule was applied in the case of a revocation of a residuary gift, Mr. Justice Mitchell repeating his criticism made in *Gray's Estate*. The Commissioners therefore recommend the abolition of the common law rule in accordance with the views expressed by the supreme court.

A legacy was held to have failed and was distributed as a part of the residuary estate where the legatee after a legal tender of the money refused to accept it. Under the Wills Act of 1917, clause 15 (c) this legacy was "incapable of taking effect." "It does not appear to need any argument to prove that a legacy cannot be forced upon any person who refuses to take it, and if it is refused when tendered, that it has failed, or is void, by reason of being 'incapable of taking effect.' Authority for this proposition is found in *Wonsetler v. Wonsetler*, 23 Super. Ct. 321, where it is said: 'While the bequest vested the title in him, his refusal to accept would leave it part of the testator's residuary estate,' and see *Cox v. Rodgers*, 77 Pa. 160; *Tar v. Robinson*, 158 Pa. 60, and *Price's Est.* 194 Pa. 135. A case in point is *Peckham v. Newton*, 4 Atl. 758 (Rhode Island), where there was a bequest of a five thousand dollar bond which was declined and renounced, and the Court citing *Jarman on Wills* (5 Am. Ed. Rand & T.) 365, 762, said: 'A residuary gift of personal estate carried not only everything not in terms disposed of, but everything that in the event turns out to be not well disposed of. A presumption arises for the residuary legatee, against every one except the particular legatee; for the testator is supposed to give his personalty away from the former only for the sake of the latter.'" *Trimble, J.* In *Kane's Estate*, 69 P. L. J. 820.

†See *Garnier v. Garnier*, 16 North 205, p. 215.

Where three daughters are residuary legatees, the fact that one of them resides in Germany and because of the Trading with the Enemy Act of October 6, 1917, her share is payable to the Alien Property Custodian, does not cause a lapse in her share that, under this section of the act, such share is divisible between the remaining daughters the sisters of the alien. The award will be to the Alien Property Custodian to hold for her until the end of the war. *Gregg's Estate*, 266 Pa. 189, 109 Atl. 177.

Testatrix specifically devised certain premises to her husband for life, with remainder to a charitable institution. The residue of her estate she devised and bequeathed to her husband for life, with remainder to the Archbishop of Philadelphia for the same charitable institution. She died within thirty days after the execution of her will, so that the charitable bequests and devises were void under the Wills Act of June 7, 1917, Sec. 6, P. L. 403. The husband then claimed that the remainder in the premises specifically devised to him for life, passed to him in fee, under the Wills Act of 1917, Sec. 15 (c), *held*, "This provision of the new act was clearly intended to abolish the common law rule criticized by the Supreme Court in *Gray's Estate*, 147 Pa. 67, that where the residuary estate is devised to or among a number of devisees, and the devise as to one or more of them lapses, or is avoided by some rule of law, or is revoked, an intestacy resulted as to that share under the former rule. The obvious intention of the act was to introduce the principle that in devises of this nature the void or revoked share is to be divided among the other residuary devisees in proportion to their respective interests. This contemplates the case where the residuary devisees are given aliquot shares in the residue, and not to a case like the present, where the devisees are respectively life tenant and the remainderman and thus given estates of a different quality." *Gest, J., in McNulty's Estate*, 29 Dist. 709.

Testator, after disposing of his personalty, gave his real estate to his wife for her life. In a residuary clause of his will he devised to two other persons all of his estate that remained at the death of his wife, but devised to her, in case of the death before her of one of the residuary devisees, the share of such deceased devisee. *Terry, P. J.*, in holding that under Section 15 of the Wills Act of June 7, 1917, P. L. 403, the contingent devise to the wife did not lapse by reason of her death, as well as that of said devisee, in the lifetime of the testator, but passed to the other residuary devisee, and consequently the testator's collateral heirs had no standing to ask for partition of the real estate devised, said: "Another provision in said subdivision of said section of the Wills Act, which is new, is that a lapsed or void devise or bequest in the residuary clause of a will shall pass to the other residuary devisees or legatees. The testator here, in such clause of his will, provided that if *Allen Miller*, one of his two residuary devisees, died before his wife, she should have *Miller's 'share'* of the estate. Following that event and upon her death, *Fred Osterhout*, the 'other' residuary devisee within the intendment of the aforesaid provision of the Wills Act of 1917, took his mother's interest, the lapse of the devise to her being thus prevented. The petitioner claims only as stated, and his asserted right to share in said estate rests solely on the assumption of a lapsed devise—to testator's wife. As it did not lapse, the petitioner has no interest in the real estate in controversy, and, therefore, no standing to demand its partition." *Jackson's Estate*, 28 Dist. 943, 68 P. L. J. 613.

236. DEVISE OR LEGACY TO CHILDREN TO INCLUDE ADOPTED CHILDREN,—CHILDREN ADOPTED BY TESTATOR.

SECTION 16. (a) Whenever in any will a bequest or devise shall be made to the child or children of the testator, without naming such child or children, such bequest or devise shall be construed to include any adopted child or children of the testator, unless a contrary intention shall appear by the will.

NOTE.—This is a new clause, introduced in conformity to the provisions of the new Intestate Act relating to inheritance by adopted children.

This and the following section were cited to show that since the legislature had the rights of adopted children constantly in mind, their omission from Section 21 of the Wills Act was intentional and that it was not intended to include after-adopted children within its provisions. *Boyd's Estate*, 50 Pa. C. C. 163, 10 West. 47; affirmed in 270 Pa. 504. See also *Moore's Est.*, 30 Dist. 152, 68 P. L. J. 670, 15 Del. 367.

237. CHILDREN ADOPTED BY DEVISEE OR LEGATEE.

(b) Whenever in any will a bequest or devise shall be made to the child or children of any person other than the testator, without naming such child or children, such bequest or devise shall be construed to include any adopted child or children of such other person who were adopted before the date of the will, unless a contrary intention shall appear by the will.

NOTE.—This clause is also new. It is limited to the case of children adopted before the date of the will since it is a statutory canon of construction referable to the time when the testator makes his will. An extension to include children adopted after the date of the will would tend to defeat the intention of the testator.

See *Moore's Est.*, 30 Dist. 152, 68 P. L. J. 670, 15 Del. 367. *Boyd's Est.*, 50 Pa. C. C. 163, 10 West 47 aff'd in 270 Pa. 504.

An adopted child of a son of testator was held entitled to distribution under the Wills Act of 1917, where the son died subsequent to the execution of the will, but prior to testator's death. The will provided: "All the rest and residue of my estate, of whatsoever nature and wheresoever situate, at the time of my decease, I give, devise and bequeath to my beloved children who are living at the date hereof, their heirs and assigns, share and share alike. The child or children of any of my children now living, but who die before me, to receive the share or portion its or their parents would have received had he or she been living at the time of my death."

The Wills Act of 1917 changed the rights of adopted children. Under this act they now have the same rights of inheritance as children born in lawful wedlock.

Trimble, J., held: "'Issue,' in Section 15 (a) and 'child' or 'children' in Section 16 (b) are necessarily synonymous in the restricted sense that their rights of inheritance are the same, and all that is required by the latter subsection is that 'child' or 'children' 'shall be construed to include adopted children.' There can be no doubt that the legislature has the right to say who shall inherit, and that it properly exercises this right in describing the class referred to as 'child or children' by including adopted children. If this were not so, all our statutes regulating adoption which have given the right of inheritance would be void in this respect. A contrary view would arise from a strict interpretation, by adhering to the letter and not to the spirit of the law. * * * If an adopted child can be included as one of the next of kin or heirs at law who would take in intestacy, it cannot be said that the legislature does not have the authority to include adopted children as part of the class of children who take under a will." *Hill's Estate*, 69 P. L. J. 177, 30 Dist. 477, s. c. 69 P. L. J. 348.

238. PECUNIARY LEGACIES TO BE CHARGED ON RESIDUARY REAL ESTATE.

SECTION 17. All pecuniary legacies contained in any will shall be charged upon and payable out of any real estate not specifically devised, where the personal estate is insufficient for their payment, or where the personal estate though originally sufficient has been wasted or misapplied by the executor, unless a contrary intention shall appear by the will.

NOTE.—This section is new. The ordinary rule is that the personal estate is not merely the primary fund for the payment of legacies, but the only fund applicable thereto, unless they are made a charge upon the real estate either by express terms or by clear implication. The Commissioners are of opinion that the real estate not specifically devised should be assets for the payment of pecuniary legacies unless a contrary intention appears from the will. This change is in accordance with several others suggested by the Commissioners, which tend to the establishment of uniformity in the descent and distribution of realty and personalty, both being considered as forms of property.

Many testators are unaware of the distinctions made by the law in this respect, which depend for the most part upon historical reasons that at the present day have lost their original significance; and such testators, when they bequeath legacies of sums of money, will naturally expect them to be paid even if their personal estates should prove insufficient. The personal estate will continue as before to be the primary fund for the payment of pecuniary legacies, the section of the act now recommended charging their payment on real estate not specifically devised unless a contrary intention appears, thus merely changing the presumption of the testator's intention.

In Maryland, a similar change was effected by Chapter 438 of the Laws of 1894.

The provision applicable to the case of a devastavit of the personal estate is believed to express the law as it now stands where legacies are charged on land by the will: *Cook v. Petty*, 108 Pa. 138, and is included by way of precaution.

See *Greaves' Estate*, 29 Dist. 577.

Testator bequeathed to his favored niece, whom he had brought from Germany to be his housekeeper and with whom he had lived for nearly thirty years, "all my personal property of every description, * * * including bonds, mortgages, certificates of stock, household furniture, jewelry, ornaments and articles of decoration" absolutely. He gave the general residue to others and authorized his executrix to sell his realty to the best interest of the estate; *held*, this was a specific legacy, and the debts, expenses and other legacies were payable out of the proceeds of realty. *Gruner's Est.*, 49 Pa. C. C. 642, 29 Dist. 1095.

Where testator devised all the residue of his estate to his wife for life "subject to the above devise and bequests to my brother and my sisters," and further directed that his wife, if she elected to take under his will, "shall execute such acquittance or acquittances as may be necessary for vesting in my said brother and sisters the devise and bequests herein made to them; it was held that the legacies were a charge upon the real estate on failure of the personalty as under Section 17 of the Wills Act of 1917, no contrary intention could be gathered from the express terms of the will.

Where even it does not abundantly appear from the whole will that testator did not intend to exempt his land from the payment of pecuniary legacies and the law stood to-day as it was prior to enactment of Section 17 of the Wills Act of 1917, the fact of the blending of all his estate for the purpose of distribution would require the construction to sustain the contention that the legacies are chargeable upon the land on failure of the personalty.

The court said: "Not only can no contrary intention be gathered by express words or by implication exempting the payment of the two pecuniary legacies of one thousand dollars each, set forth in the petition as liens upon the land, but the terms of the will expressly provide that the bequests of the residuary estate, first to the widow for her life and afterwards among his children in fee simple, are subject to the devise and bequests in favor of his brother and his two sisters: to make this most clear, he directs that his widow, if she takes under the will, shall execute such acquittance or acquittances as may be necessary for vesting in these three legatees the bequests to them. This necessarily carries with it a strong declaration that his estate, irrespective of its kind, shall pay these legacies, and that as an evidence thereof the widow must obtain from them what he calls an acquittance—meaning a release or receipt." *Mulgrew's Estate*, 69 P. L. J. 169.

239. DEVISES OF REAL ESTATE SUBJECT TO MORTGAGE.

SECTION 18. Unless the testator shall otherwise direct by his will, the devisee of real estate, which is subject to mortgage, shall take subject thereto and shall not be entitled to exoneration out of the other estate of the testator, real or personal, and this whether the mortgage was created by the testator or by a previous owner or owners, and notwithstanding any general direction by the testator that his debts be paid.

NOTE.—This is a new section, intended to remove the existing distinction between mortgages made by the testator and those created by previous owners: *Hirst's Appeal*, 92 Pa. 491; *Stuard's Estate*, 17 Phila. 498; *Burton's Estate*, 15 Pa. C. C. 367. The distinction is a very technical one, not based on any presumed intention of the testator, but simply on the ground that the personal estate is still the primary fund for the payment of debts, as at one time it was the only asset. This historical justification of the rule has long been outgrown; and the change here recommended is in accord with the English Statutes of 17 and 18 Vict., Chapter 113; 30 and 31 Vict., Chapter 69; and 40 and 41 Vict., Chapter 34, known as the *Locke King Acts*. Those statutes contain further provisions, which the Commissioners have not included, considering them either unnecessary or inapplicable in this state.

240. SPENDTHRIFT TRUSTEES; INCOME TO BE LIABLE FOR MAINTENANCE OF WIFE AND MINOR CHILDREN.

SECTION 19. All income whatsoever, devised or bequeathed by any will so as to be free from liability for the debts, contracts or engagements of the beneficiary, or so as not to be subject to execution, attachment sur judgment, sequestration or other process, shall notwithstanding such testamentary provisions be subject to and liable for the support and maintenance of the wife and minor children of the beneficiary and for the value of necessities furnished to them or any of them, where said beneficiary has refused or neglected to provide suitably for them, and all of the income of said beneficiary shall be subject to all legal process issued by any court of this commonwealth having jurisdiction in the premises in order to enforce such liability of said beneficiary.

NOTE.—This is a new section. A similar provision as to orders for support appears in the Act of April 15, 1913, P. L. 72, 5 Purd. 5919, amending Section 2 of the Act of March 5, 1907, P. L. 6.

The Commissioners have been impressed with the evil arising from the abuse of the doctrine of spendthrift trusts in this commonwealth.

The decisions of the courts hold it legal for a testator in disposing of his own property to bequeath it in trust so that it shall not be liable for the debts of the beneficiary; but it is believed that this protection should not be accorded to prevent the application of the income to the support and maintenance of the family of the beneficiary, and enable him to escape his marital and parental duties.

Since the present act is to apply only to the estates of persons dying after its approval, this section does not fall within the opinion in *Com. v. Thomas*, 65 Super. 275, holding the Act of 1913 invalid as to the estates of testators dying before the date of that act.

241. REVOCATION OF WILLS,—OF LANDS.

SECTION 20. (a) No will in writing concerning any real estate shall be repealed nor shall any devise or directions therein be altered otherwise than by some other will or codicil in writing, or other writing declaring the same, executed and proved in the manner hereinbefore provided, or by burning, cancelling, obliterating or destroying the same by the testator himself, or by someone in his presence, and by his express direction.

NORE.—This is Section 13 of the Act of April 8, 1833, P. L. 249, 4 Purd. 5130-5, which was founded on Section 6 of the Act of 1705, 1 Sm. L. 33, that section, however, relating to personal estate only.

"Under the 13th section of the Act of 1833, reenacted by the Act of June 7, 1917, P. L. 409, that which was once a perfect will must remain such, unless repealed, altered or destroyed in one of the ways designated by the act; and a mere direction to destroy, however express, can never amount to a revocation, unless it should be followed by burning, cancelling, obliterating or destroying; otherwise the great object of the act of assembly, which was to prevent parol revocation, would be entirely lost: *Clingan v. Mitcheltree*, 31 Pa. 25; *Heise v. Heise*, 31 Pa. 246; *Dixon's App.*, 55 Pa. 424; *Jones's Est.*, 211 Pa. 364, 368. Therefore, before the question of revocation or cancellation can come up, it must appear that a perfect will was in existence upon which such question might be founded." *Justice Kephart*, in *Seiter's Estate*, 265 Pa. 202, 108 Atl. 614.

242. WILLS OF PERSONALTY.

(b) No will in writing concerning any personal estate shall be repealed, nor shall any bequest or direction therein be altered, otherwise than as hereinbefore provided in the case of real estate, except by a nuncupative will, made under the circumstances set forth in Section 4¹ of this act, and also committed to writing in the lifetime of the testator, and after the writing thereof, read to or by him, and allowed by him, and proved to be so done by two or more witnesses.

¹See 217-220 *supra*.

NOTE.—This is Section 14 of the Act of 1833, 4 Purd. 5135, which made no change in the law as it existed under the Act of 1705, 1 Sm. L. 33.

See 217-20 *supra*.

Under the Act of June 7, 1917, P. L. 409, no question of the revocation or cancellation of a will can arise, unless it is shown that a perfect will was in existence upon which such question might be founded. Under the Act of June 7, 1917, P. L. 409, that which was once a perfect will must remain such, unless repealed, altered or destroyed in one of the ways designated by the act; a mere direction to destroy, however express, can never amount to a revocation, unless it should be followed by burning, cancelling, obliterating or destroying the will. *Seiter's Estate*, 265 Pa. 202, 108 Atl. 614.

243. REVOCATION OF WILLS PRO TANTO BY SUBSEQUENT MARRIAGE OR BIRTH OF CHILDREN.

SECTION 21. When any person, male or female, shall make a last will and testament and afterward shall marry or shall have a child or children, *either by birth or by adoption*,¹ not provided for in such will, and shall die, leaving a surviving spouse and such child or children, or either a surviving spouse or such child or children, although such child or children be born after the death of their father, every such person, so far as shall regard the surviving spouse, or child or children born *or adopted*² after the making of the will, shall be deemed and construed to die intestate; and such surviving spouse, child or children, shall be entitled to such purports, shares and dividends of the estate, real and personal, of the deceased, as if such person had actually died without any will.

NOTE.—This is Section 15 of the Act of 1833, 4 Purd. 5135-7, modified so as to make the law the same with regard to women as it is with regard to men. This involves the repeal of Section 16 of the Act of 1833, 4 Purd. 5137, relating to wills of single women. In the fourth and fifth lines, "such" has been inserted before "child"; and in the ninth line, "born after the making of the will" has been substituted for "afterborn."

Section 15 of the Act of 1833 was founded on Section 23 of the Act of April 19, 1794, 3 Sm. L. 143.

The history of our legislation upon the subject is reviewed by Judge Penrose in *Fidelity Trust Company's Appeal*, 121 Pa. 1; and in *Owens v. Haines*, 199 Pa. 137, it was decided that the will of a woman was revoked *pro tanto* under the Act of 1833 by the subsequent birth of issue. To this extent, the section now reported is merely declaratory of the existing law; but the Commissioners in making its language general without distinction of sex also recommend for repeal Section 16 of the Act of 1833, 4 Purd.

¹Added by amendatory Act of May 20, 1921 (P. L. 937).

5137, which provides that a will executed by a single woman shall be deemed revoked by her subsequent marriage. This is in accordance with the views of the Commissioners as expressed in this new Wills Act, as well as in the new Intestate Act, that the property rights of husband and wife should be the same. The old law required, in case of a testator, that both marriage and birth of issue should take place in order to effect a revocation of the will, while a woman's will was revoked by marriage alone, because of the merger of her legal identity in that of her husband. In Pennsylvania, the effect of the legislation was to make either marriage or the birth of children unprovided for operate as a revocation *pro tanto* of the will of the testator, while marriage annulled the will of a woman, though birth of children unprovided for revoked it only *pro tanto*. In some other states, and in England by the Statute of 7 William IV and 1 Vict., Chapter 26, Section 18, the law has been made uniform by giving this effect of absolute revocation to the mere marriage of the testator as well as to the marriage of a testatrix, a change that does not appear advisable, for the purpose of the doctrine of implied revocation by such a change of circumstances is only to protect the rights of those persons who as spouse or children afterward come into being. This object is accomplished by providing in every case for a revocation so far as such persons are concerned, and it is not necessary to annul the entire will.

Where a widow makes her will, marries a second time, and dies leaving in existence the will made prior to her second marriage, her surviving husband is entitled under the Wills Act of June 7, 1917, P. L. 403, and the Intestate Act of June 7, 1917, P. L. 429, as amended by the Act of July 11, 1917, P. L. 755, to the allowance of \$5,000 provided by the Intestate Act. By her remarriage her will, as to her second husband, was annulled, and there was an actual intestacy as to him. *Shestack's Est.*, 267 Pa. 115, 110 Atl. 166.

Testator, by his will, disposed of his entire estate; afterwards he married, and then executed a codicil giving, inter alia, to his wife the premises occupied by them at the time of his death, with all furniture and silverware contained therein, and \$25,000 in cash, "in addition to any interest which my said wife would take under my will *or* under the intestate laws." After his death the widow filed her election to take under the codicil of the will the amount therein given to her, to wit, the mansion house, the sum of \$25,000, and the amount which she would have received had he died intestate. At the audit she claimed these portions of the estate, in addition to her exemption of \$500. The auditing judge allowed her claim, holding that the election filed amounted to an election to take under the will and codicil, and that in effect testator had incorporated the provisions of the intestate law into his will and considered his will and codicil as making one will together. *Gest, J., held:*

"Stress was laid by counsel in the argument on the other side upon the use of the word '*or*' as defining an alternative of two bequests, either of which she might take, but not both, thus putting the widow to an election, not as surviving spouse, but as a legatee, to whom is given a choice of two

bequests. But the answer is that, so far as the widow was concerned, the will was revoked by the statute, Wills Act of 1917, Section 21, reenacting the Act of April 8, 1833, Section 15, P. L. 315, and expressly declaring that where the testator, after making his will, shall afterwards marry, such person, so far as shall regard the surviving spouse, shall be deemed and construed to die intestate. The word 'or' in this connection, may, therefore, fairly be construed to be used in its expegetical or explanatory sense, as equivalent to the words 'that is to say.' Greaves's Est., 29 Dist. 577.

In a case where a common law marriage was not successfully proven, Solly, P. J., held: "Section 21 of the Fiduciaries Act (should be Wills Act) provides, 'When any person, male or female, shall make a last will and testament and afterward shall marry * * * and shall die, leaving a surviving spouse * * * every such person, so far as shall regard the surviving spouse, * * * shall be deemed and construed to die intestate; and such surviving spouse * * * shall be entitled to such purparts, shares and dividends of the estate, real and personal, of the deceased, as if such person had actually died without any will.' The person shall be deemed to die intestate, and the surviving husband shall be entitled to the same share in the estate of his wife as if she had actually died without any will. This language is plain and clearly expresses the intent of the Legislature. If a person makes a will and afterwards marries and dies, leaving a spouse surviving, his or her will is of no effect as to said spouse and he or she shall be construed to die intestate, and the surviving spouse shall have such share of the estate as if there was no will, as if the spouse had actually died without a will. If, therefore, there is no will in law, as to the surviving spouse, he or she is entitled to such share of the deceased spouse's estate as if there was an actual intestacy, and the Intestate Act of 1917 provides what that share shall be. * * * It is contended by the surviving husband that there is in this case a partial intestacy. We think if he was not the husband of the testatrix when she made her will, but afterwards married her, there was an intestacy, and she is to be deemed and construed to die intestate, by the express language of Section 21 of the Wills Act of 1917, and he is entitled to the share of his wife's estate as provided by Section 2 of the Fiduciaries ("Intestate") Act. These are the plain and unmistakable constructions to be placed upon the two acts.' Pfanenschmidt's Est., 35 Montg. 135.

REVOCATION BY BIRTH OF ISSUE.

Under this section of the Wills Act the birth of a child subsequent to the making of a will by its parent operates as a revocation of the will, so far as the will is an execution of a power of appointment, where the child takes under the donor's will in default of appointment, to the extent of such child's alternative rights. Shoch's Est., 29 Dist. 1163, aff'd in 271 Pa. 158.

REVOCATION BY ADOPTION OF CHILDREN

Where decedent, subsequent to date of his will adopted two children by formal proceedings, the court in considering the election of the widow

to take under the will, and after quoting the 16th section of the Intestate Act and the 16th section of the Wills Act to show that therein the legislature had in mind the rights of adopted children, *held*:

"But since the legislature seems to have been so careful to make it clear in these sections that adopted children are to be included in these provisions for children generally, it seems quite clear that such was not the intention in so far as regards the provision in Section 21 relating to the rights of children born after the making of a will. Certainly, if the legislature had considered the language of the Adopting Act of 1915 or the Intestate Act of 1917, efficacious to make language used in the 21st section of the Wills Act include adopted children, it would not have thought it necessary to incorporate Sections 8 and 16 in the Wills Act.

"I am therefore of opinion that the legislation of 1917 does not change the law in Pennsylvania that adopted children are not entitled to any rights in their adopting parent's estate where the adoption takes place after the adopting parent has executed a will and this whole estate will in accordance with this opinion be distributed under the terms of the will." *Boyd's Est.*, 50 Pa. C. C. 163, 10 West. 47, *aff'd* in 270 Pa. 504.

"It is well known that the latter act (Sec. 21 of Wills Act of 1917) was framed by a commission, singularly competent on the branch of the law with which it had to deal, and that its report to the legislature was adopted substantially without change. This commission, and the legislature, knew the state of the law as to adopted children as it then was, and did not, so far as the rights of those adopted after the making of a will are concerned, place them in the same position as children of the adopting parent. Nothing is said in the act as to adopted children; but, on the contrary, it refers "to a child or children *born* after the making of the will." As the right of inheritance is purely statutory, and he who claims a share in the inheritance must point to the law which transmits it to him, we are constrained to hold, by the very words of the act and in agreement with the reasoning in *Goldstein v. Hammell* (236 Pa. 305), that the appellants can assert no interest in the estate of their adopted father. If it is deemed wise to provide that adopted children shall have the rights here claimed for them, the legislature can extend the law to cover them; we cannot." Per Mr. Justice Schaffer in affirming *Boyd's Est.*, *supra*, in 270 Pa. 504.

See now however, Act of May 20, 1921, P. L. 937.

244. FORFEITURE OF RIGHTS BY DEVISEE OR LEGATEE WHO MURDERS THE TESTATOR.

SECTION 22. No person who shall be finally adjudged guilty, either as principal or accessory, of murder of the first or second degree, shall be entitled to take any part of the real or personal estate of the person killed, as devisee or legatee or otherwise under the will of such person.

NORE.—This is a new section, corresponding to Section 23 of the new Intestate Act. (See 347 *infra*.) See the note to that section.

245. ELECTION TO TAKE UNDER OR AGAINST WILLS,—RIGHT OF SURVIVING SPOUSE TO TAKE AGAINST WILL OF DECEASED SPOUSE.

SECTION 23. (a) When any person shall die testate leaving a surviving spouse, who shall elect to take against the will, such surviving spouse shall be entitled to such interests in the real and personal estate of the deceased spouse as he or she would have been entitled to had the testator died intestate: *Provided*, That nothing herein contained shall affect the right or power of a married woman, by virtue of any authority or appointment contained in any deed or will, to bequeath or devise any property held in trust for her sole and separate use.

NOTE.—This is a new section, framed to make the rights of husband and wife the same in electing to take against a will. The proviso is copied from Section 1 of the Act of May 4, 1855, P. L. 430, 3 Purd. 2460.

The adoption of this section involves the repeal of Section 11 of the Act of 1833, 1 Purd. 1275-6; Section 11 of the Act of April 11, 1848, P. L. 537, 1 Purd. 1276-7; Section 1 of the Act of May 4, 1855, *supra*; and Section 1 of the Act of April 20, 1869, P. L. 77, 1 Purd. 1278.

See forms 69-7. See Flower's Est., 30 Dist. 967.

As against the more certain provisions of Section 2 (a) of the Intestate Act, it was held that the election by a widow to take against a will did not created under this section of the Wills Act, such an intestacy as would entitle her to the allowance of \$5,000 provided in the said section of the Intestate Act. Collom's Estate, 47 Pa. C. C. 434, 28 Dist. 503.

"The situation confronting us is the provision of the Wills Act that the spouse taking against the will shall take as he or she would have been entitled to had the testator died intestate and the provision of Section 2 (a) of the Intestate Act as amended. The intention of the legislature to distinguish between a surviving spouse of a testate and an intestate is perfectly apparent from the text of the proviso in the Intestate Act. With no other law in the statutes of the commonwealth providing what should be taken by the surviving spouse of a deceased testate who might elect to take against the will, this would have barred him or her from participating in the distribution of the estate. With the provision which is contained in the Wills Act, it might have been construed that the surviving spouse takes in the same manner and amount as the surviving spouse of an intestate. That, however, is not before the court for determination, but the intention of the legislature to place them on a different basis as to inheritance is emphasized by the amendment of July 11, 1917, P. L. 755. Clearly, it was the intention of the legislature that the surviving spouse of one dying testate, who elected to take against the will, should not enjoy the full benefits enjoyed by the surviving spouse of an intestate and that she should not enjoy the benefits of the five thousand dollars in value. Therefore, we hold that the surviving spouse of one dying testate, electing

to take against the will of the deceased spouse, is not entitled to the \$5,000 in value, but takes in accordance with the provisions of Section 2 (a) of the Act of Assembly of June 7, 1917, P. L. 429, as amended by the Act of July 11, 1917, P. L. 755." Shull, P. J., in *Langerwisch's Estate*, 47 Pa. C. C. 121, 28 Dist. 470, 8 Lehigh 147, affirmed in 267 Pa. 319, 110 Atl. 165.

The fact that the testator directs a sale of his real estate, thus working a conversion, and impressed the proceeds with a trust in favor of his widow and others, does not preclude the widow who elects to take against the will from taking her interest in the real estate as realty, and demanding that it be set apart for her in severalty.

"When the widow perfected her election to take against the will, she, thereupon, under the laws of the commonwealth, became invested with a fixed interest in the decedent's real estate specifically as land and by her said action did not thereby become entitled to receive merely a portion of the proceeds to accrue from a sale thereof. Her rights upon such election are defined by the Wills Act of 1917, P. L. 403, which, being in force and effect at the time of her husband's death, governs and controls his estate and the administration and devolution thereof. Clause (a) of Section 23 of that statute provides, that in the event of a surviving spouse's electing to take against a decedent's will, 'such surviving spouse shall be entitled to such interests in the real and personal estate of the deceased spouse as he or she would have been entitled to, had the testator died intestate.' Note particularly that the statute, in plain language, gives the surviving spouse an interest in specific real and personal estate as such and not merely in the proceeds thereof or any substitution therefor. Now, had the decedent died intestate, there would of course have been no will, and, as to the decedent's real estate, the widow, upon his death, would have inherited a specific interest in the land itself. Under such circumstances there could, by no possibility, have been any proceeds of or substitution for, the real estate for her consideration. The said statute in the clearest language imaginable gives to, and vests in, her a share of the land itself. Such has always been the quality or kind of interest, to wit, an interest in land itself, which the laws of the Commonwealth of Pennsylvania have vested in widows, upon their electing to take against their husband's wills. Under Section 11 of the Wills Act of April 8, 1833, P. L. 250, a widow electing to take against her deceased husband's will became entitled to common law dower in his real estate, to wit, a freehold interest therein: *Watterson's Appeal*, 95 Pa. 312 (1880). The Act of April 20, 1869, P. L. 77, changed the share of a widow electing to take against her husband's will from common law dower to so-called statutory dower. Thus, it is seen that under both of these older statutes the interest which vested in a widow upon her electing to take against her husband's will, was a share of the land itself and not of the proceeds of the sale thereof or substitution therefor. The precise language of the said provision of the Act of April 20, 1869, P. L. 77 (changed only so as to include surviving husbands), has been reenacted and now forms a part of said Section 23 of the Wills Act of 1917, P. L. 403; hence the decisions under the former act apply with equal force and effect to the same provisions incorporated in the later statute." * * * "Upon deliberating on the unequivocal

language of the said pertinent statutory provision which applies to and controls the present estate, its administration and devolution, to wit, Section 23 of the Wills Act of 1917, P. L. 403, and, guided by the light afforded by the authorities recited, we reach the legal conclusion that upon the petitioner's electing to take against her deceased husband's will, she then became entitled to and was invested with, *inter alia*, a one-half part, share or interest in his real estate which forms the subject matter of this proceeding; and that her ownership of such part, share or interest incidentally carries with it, the absolute right to have the same cut off in severalty from the remaining undivided interests and shares, and that accordingly she has due standing in law to maintain this proceeding to effect such partition; possessing such absolute right notwithstanding the fact that the remaining interests or shares are made subject to a trust by the provisions of the will: *Reid v. Glendenning*, 193 Pa. 406 (1899)." * * * "As the decedent, William S. Dodd, whose estate is before us, died on September 19, 1920, to wit, long after December 31, 1917, the date upon which the Wills Act of 1917, P. L. 403, and the Intestate Act of 1917, P. L. 429, both became operative, this estate, its administration and devolution, are therefore manifestly subject to the control of these two statutes. We are, therefore, clearly of the opinion that the petitioner, as widow of the decedent, upon her electing to take against her husband's will became, under Section 23 of the said Wills Act of 1917, P. L. 403, and under Section 2 (a) of the said Intestate Act of 1917, P. L. 429, entitled to and invested with, an undivided one-half part, share or interest in fee simple, in said decedent's real estate; and that the cited portions of the said Orphans' Court Partition Act of 1917, P. L. 337 (15, 18 and 29), do not and are not designed to diminish such fee simple share, part or interest so prescribed for the widow in and by the said Wills Act and Intestate Act." *Dodd's Estate*, 1 Wash. 236.

That section of the Wills Act of 1917 which provides that a failure to make an election within two years "shall be deemed an election to take under the will" is of no retroactive effect, and does not apply where testator died prior to the passage of said act. This is a new provision introduced by the Act of 1917, and was no part of the law until that time.

"Section 23 of the statute prescribes the form, requirements and procedure in the matter of spouses' elections to take under or against decedents' wills. The employment of the word 'shall' in the opening sentence of this section indicates futurity, to wit, that the provisions of such section are to apply only to the estates of those who die after the said act shall become operative, or, at least, after its passage. *Annie E. Young* died on March 26, 1917, months before the time set for the Wills Act to become operative, to wit, December 31, 1917, and months, moreover, before the bill was enacted by the legislature or approved by the governor. Again Section 26 of the act in express and unconditional language makes the statute apply only to the wills of persons dying on or after December 31, 1917; providing that as to the wills of all persons dying before that day, the existing laws should remain in full force and effect. Under the laws of the Commonwealth which were in force at the date of the death of the testatrix, there was no time fixed or limited during which a surviving spouse was obliged to make his or her election, under penalty of being

deemed and held to have elected to take under the will, because of neglect or failure to make such election during such limited period. See Beck's Estate, 265 Pa. 51 (1919). The said two-year period is applicable only to estates of testates dying on or after December 31, 1917." Per Hughes, P. J., in Young's Estate, 1 Wash. 250.

Where a testator executed a will in which he made no provision for his wife, the latter can take against the will, notwithstanding the fact that she was not living with her husband at the time of his death, unless her wilful and malicious desertion has been clearly established. Schreckengost's Est., 77 Super. 235.

246. HOW ELECTION TO BE MANIFESTED AND WITHIN WHAT TIME.

(b) A surviving spouse electing to take under or against the will of the decedent shall, in all cases, manifest the election by a writing signed by him or her, duly acknowledged before an officer authorized by law to take the acknowledgment of deeds, and delivered to the executor or administrator of the estate of such decedent, within two years after the issuance of letters testamentary or of administration. Neglect or refusal or failure to deliver such writing within said period shall be deemed an election to take under the will.

NOTE.—This is founded on Section 1 of the Act of April 21, 1911, P. L. 79, 7 Purd. 7766. The two-year limitation is new, the provision that failure to elect shall be deemed an election to take under the will being similar to the provision in Section 35 of the Act of 1832, which is embodied in clause (d) of this section.

It is the duty of an executor asking the widow to make her election whether to take under her husband's will or not, to inform her of the condition of the estate, fully and correctly.

Where a widow, the day after her husband's funeral, with the executor of her husband's will, visited the executor's attorney, who told her, in a language in which she was unaccustomed to converse, and under circumstances and surroundings unfamiliar to her, that under her husband's will she will receive nothing of his estate but the amount of the widow's exemption and explained the estimated amount she would receive if she should take against the will, and she then expressed an intention not "to do anything but what her husband had done," executed and acknowledged a formal acceptance of the will, and received from the executor a payment of twenty dollars; and subsequently in proceedings to rescind her acceptance, the court found that when she executed the election to take under the will, she did not have such a clear conception of the estate and her rights therein as would enable her to make a proper decision, although no intentional deception was practiced upon her, her election

to take under the will was cancelled, and she was permitted to elect to take against the will. In so holding the court, per Ross, J., said, *inter alia* :

"The established right of a widow to take against the provisions of the will of her deceased husband, is recognized by the Act of June 7, 1917, P. L. 403, and the 23d section of that act prescribes the method by which she shall elect to take, either under or against the will. * * * In view of the fact that the Wills Act of 1917 provides a definite time (two years) for the widow to elect and six months before she can be cited to elect, and a further month for reflection after the citation issues, it is evident that the legislature intended to revive and extend the time limitation, which was formerly given the widow by the Act of 1832, and thus bring its interpretation within the law illustrated by the existing decisions of the Supreme Court (some of which we have cited) and cure the Act of April 21, 1911, P. L. 79, by making it plain that a technical compliance with the provisions of the 'Wills Act' would not preclude widows from rescinding their election when made under circumstances such as the evidence reveals in the case at bar." *Lehman's Estate*, 33 York 113, 8 Lehigh 315.

That section of the Wills Act of 1917 which provides that a failure to make an election within two years "shall be deemed an election to take under the will" is of no retroactive effect, and does not apply where testator died prior to the passage of said act. This is a new provision introduced by the Act of 1917 and was no part of the law until that time.

"The remaindermen maintain that on account of the failure on the part of the petitioner for a period of two years following the decedent's death, to execute, acknowledge and deliver a formal election to take against the will, in conformity with the requirements of the Act of April 21, 1911, P. L. 79, he must be deemed in law, to have elected to take under the will. The provisions of the last paragraph of clause (b) of Section 23 of the Wills Act of 1917, P. L. 403 (which they contend in spirit and intent governs the administration and devolution of the estate before us, although this testatrix died months before the said Wills Act of 1917, P. L. 403, became operative), providing that 'neglect or refusal to deliver such writing within said period shall be deemed an election to take under the will.' The provisions of this paragraph were no part of the laws of the commonwealth until introduced as a part of the said Wills Act of 1917, P. L. 403; hence the said provisions can have no applicability to the estate of this decedent, unless the same are by the statute made or intended to be, retroactive. Nowhere in this statute do we find anything to indicate that such provision thereof is intended to be retroactive; but on the other hand the act, in plain language, shows that it is not to be deemed retroactive. Section 23 of the statute prescribes the form, requirements and procedure in the matter of spouses' elections to take under or against decedents' wills. The employment of the word 'shall' in the opening sentence of this section indicates futurity, to wit, that the provisions of such section are to apply only to the estates of those who die after the said act shall become operative, or, at least, after its passage. Annie E. Young died on March 26, 1917, months before the time set for the Wills Act to become operative, to wit, December 31, 1917, and months, moreover, before the bill was enacted by the legislature or approved by the governor.

Again Section 26 of the act in express and unconditional language makes the statute apply only to the wills of persons dying on or after December 31, 1917, providing that as to the wills of all persons dying before that day, the existing laws should remain in full force and effect. Under the laws of the commonwealth which were in force at the date of the death of the testatrix, there was no time fixed or limited during which a surviving spouse was obliged to make his or her election, under penalty of being deemed and held to have elected to take under the will, because of neglect or failure to make such election during such limited period. See *Beck's Estate*, 265 Pa. 51 (1919). The said two-year period is applicable only to estates of testates dying on or after December 31, 1917." Per *Hughes*, P. J., in *Young's Est.*, 1 Wash. 250.

A surviving spouse must file an election to take against the will of the deceased spouse within two years of the issuance of letters testamentary or of administration, as required by Section 23 (b) of the Wills Act of June 7, 1917, P. L. 403, 410.

A widow, living apart from her husband, although in Philadelphia, where he resided, was notified of his death by his executor immediately after it occurred; the grant of letters was duly advertised; the petition for probate of the will correctly stated the testator's real and personal property; the inventory was duly filed; but she filed no election to take against his will until more than two years after the issuance of letters: *Held*, that her election was too late.

Under these facts the executor was under no duty to seek the widow out and advise or assist her to take against the will.

The widow was not relieved from the necessity of filing an election in accordance with the Act of 1917, by reason of the fact that the will did not leave her anything.

"The object of the Legislature was evidently to fix a definite time after which the right to elect against the will should cease (unless, perhaps, fraud be shown), and, as the auditing judge well says, this clause of the statute is one for the protection of those dealing with the estates of decedents, and is to be regarded as a statute of repose. It will be remembered that formerly an election could be made at any time and need not even be in writing. The Act of May 29, 1832, Sec. 35, P. L. 190, 1 *Purd.* 1277, provided a means by citation to compel the widow to make her election as a matter of record after the expiration of a year from the testator's death. The Act of April 21, 1911, P. L. 79, 7 *Purd.* 7766, then enacted that surviving husbands or wives, electing to take under or against the wills of decedents, should in all cases manifest their elections in writing, signed and acknowledged, and even provided that no payment should be made to any husband or wife unless the election was executed, acknowledged and delivered; the manifest intention of this act being, as was said in *Beck's Estate*, 265 Pa. 51, to promote certainty in the settlement of estates.

"The present section, twenty-three of the Wills Act, in clause (a) assimilated the rights of the surviving husband and wife; clause (b) founded on Section 1 of the Act of 1911, provided that the election should be made in writing, signed and acknowledged, and added the two-year

limitation involved in this case. Clause (c) practically reenacted the second section of the Act of 1911, and clause (d) extended the citation granted by the Act of 1832 to the case of a husband, theretofore not included, and shortened the period from twelve to six months.

"That the limitation prescribed by the statute must be observed at least in the absence of fraud, would appear to be perfectly clear from the language of the act, and the industry of counsel has discovered decisions in other states where similar acts have been likewise construed. Among them are *Scheible v. Rinck*, 195 Ill. 636; *Shelton v. Sears*, 187 Mass. 455; *Akin v. Kellogg*, 119 N. Y. 441; *Smith v. Smith*, 20 Vt. 270." *Gest, J.*, in *Flower's Estate*, 30 Dist. 967.

247. NO PAYMENTS TO BE REQUIRED BEFORE ELECTION.

(c) No payment from the estate of such decedent, except the exemption allowed by law to the widow, shall be required to be made to any surviving spouse unless his or her election shall have been first duly executed, acknowledged and delivered, as provided in clause (b) of this section.

NOTE.—This is Section 2 of the Act of April 21, 1911, P. L. 79, 7 Purd. 7766, changed by inserting the provision as to widow's exemption, and the words "required to be."

See *Flower's Est*, 30 Dist. 967.

248. SURVIVING SPOUSE MAY BE CITED TO MAKE ELECTION.

(d) The orphans' court, on the application of any person interested in the estate of a decedent, may issue a citation, at any time after six months from the death of the testator, to the surviving spouse of the testator, to appear at a certain time not less than one month thereafter, in the said court, to make his or her election to take under or against the will, which election shall be filed of record, and shall be conclusive. If the surviving spouse shall neglect or refuse to appear on such citation, then upon due proof being made to the court of the service thereof, the said neglect or refusal shall be deemed an election to take under the will, and the decree of the court to that effect shall be conclusive.

NOTE.—This is founded on Section 35 of the Act of March 29, 1832, P. L. 200, 1 Purd. 1277-8. The changes are the extension of the section to husband as well as wife, and the shortening of the period from twelve to six months, in harmony with the reduction of the period for the filing of the account. Some changes in phraseology have been made with a view to clearness.

Where the Court of Common Pleas has refused the guardian of a weak-minded person permission to elect to take against the will of the ward's deceased husband, an order will not be made upon the petition of the executor directing the guardian to take under the will, although without such order the executor may not be able to make a good title to real estate which the will directs to be sold. *Haack's Est.*, 30 Dist. 669.

See *Flower's Est.*, 30 Dist. 967.

249. ELECTION OF SURVIVING SPOUSE, OR DECREE OF COURT WHERE THERE IS A FAILURE TO ELECT, TO BE RECORDED AND FILED.

(*e*) The election by a surviving spouse, or a certified copy of the final decree of any orphans' court, in cases where there shall have been an election in accordance with clause (*d*) hereof, or a neglect or refusal to elect within the time prescribed by the order of the said court, shall, at the cost of the estate, be recorded by the personal representative of the decedent, in the office for the recording of deeds of the county where the decedent's will is probated, in the deed book, and shall be indexed by the recorder in the grantors' index under the name of the decedent, and in the grantees' index under the name of the surviving spouse, and shall be registered in the survey bureau, or with the proper authorities empowered to keep a register of real estate, if any there be, in said county. The charges for recording and registering shall be the same as are provided by law for similar services. The election, or decree of the court, or a certified copy of either, may also be recorded in any office for the recording of deeds within this commonwealth, with the same effect as if a duly signed and acknowledged declaration to the effect stated therein had been made by the person authorized to elect, and at his or her request recorded in said office according to law. After the said election shall have been recorded in the office for the recording of deeds as aforesaid, the said election, at the cost of the estate, shall be filed in the office of the clerk of the orphans' court and a record made of such filing by the said clerk.

NOTE.—This is Section 3 of the Act of April 21, 1911, P. L. 79, 7 Purd. 7766, with some changes in phraseology, the substitution of the clerk of the orphans' court for the register of wills, and the insertion of the provisions as to registration and as to charges for recording and registering.

250. ACT NOT TO APPLY TO WILLS OF PERSONAL ESTATE, EXECUTED BY TESTATOR DOMICILED WITHOUT THE COMMONWEALTH.

SECTION 24. Nothing in this act contained shall be construed to apply to the disposition of personal estate by a testator whose domicile, at the time of his death, was out of this commonwealth.

NOTE.—This is Section 17 of the Act of 1833, 4 Purd. 5128, modified so as to conform to the language of Section 25 of the new Intestate Act. (See 349 *infra*.)

251. SHORT TITLE.

SECTION 25. This act shall be known and may be cited as the Wills Act of 1917.

252. WHEN ACT SHALL GO INTO OPERATION.

SECTION 26. This act shall take effect on the thirty-first day of December, 1917, and shall apply to the wills of all persons dying on or after said day. As to the wills of all persons dying before that day, the existing laws shall remain in full force and effect.

NOTE.—This section corresponds to Section 27 of the new Intestate Act. (See 351 *infra*.) It supplies Section 18 of the Act of 1833, 4 Purd. 5129.

That section of the Wills Act of 1917, which provides that a failure to make an election within two years "shall be deemed an election to take under the will" is of no retroactive effect, and does not apply where testator died prior to the passage of said act. This is a new provision introduced by the Act of 1917, and was no part of the law until that time.

"Annie E. Young died on March 26, 1917, months before the time set for the Wills Act to become operative, to wit, December 31, 1917, and months, moreover, before the bill was enacted by the legislature or approved by the governor. Again Section 26 of the act in express and unconditional language makes the statute apply only to the wills of persons dying on or after December 31, 1917; providing that as to the wills of all persons dying before that day, the existing laws should remain in full force and effect. Under the laws of the commonwealth which were in force at the date of the death of the testatrix, there was no time fixed or limited during which a surviving spouse was obliged to make his or her election, under penalty of being deemed and held to have elected to take under the will, because of neglect or failure to make such election during such limited period. See *Beck's Estate*, 265 Pa. 51 (1919). The said two-year period is applicable only to estates of testates dying on or after December 31, 1917." Per Hughes, P. J., in *Young's Est.*, 1 Wash. 250.

The Wills Act of June 7, 1917, P. L. 403, is retroactive so that where

testatrix made her will prior to the passage of the act, but did not die until after that date, the Wills Act applies. A will being ambulatory speaks as of the date of death. In so holding Miller, J., said, *inter alia* :

"The paper in question bears date and, if executed, was written on the 8th day of September, 1914, prior to the passage of the Wills Act of 1917. She died, however, after its passage, and the provisions of the Act of 1917 by its terms apply to persons dying on or after said day, irrespective of the date of the execution of the will. That the section just quoted gives retrospective effect to the act seems to be settled in Auber's App., 109 Pa. 447, and seems to be an answer to the contention that to apply the provisions of the Act of 1917 to a will made in 1914 does not involve retroactive legislation, no vested rights existing and no violation of contracts forbidden by the Constitution being involved, in view of the well known principle of law that wills, being ambulatory, speak of the date of the death of the testator." *Perry's Estate*, 67 P. L. J. 216.

The provisions of the Wills Act do not effect a case where the decedent died on August 30, 1917. See *Garnier v. Garnier*, 16 North. 205, at p. 215; *Mulligan's Est.*, 47 Pa. C. C. 546, 28 Dist. 309.

253. REPEALER.

SECTION 27. The following acts and parts of acts of assembly are hereby repealed as respectively indicated, but so far only as relates to the estates, real and personal, of any person or persons dying on or after the thirty-first day of December, 1917. The repeal of the first section of an act shall not repeal the enacting clause.

Sections 3, 4, 6 and 7 of an act entitled "An act concerning the probates of written and nuncupative wills, and for confirming devises of lands," passed in 1705, 1 Sm. L. 33, absolutely.

Section 23 of an act entitled "An act directing the descent of intestates' real estates, and distribution of their personal estates, and for other purposes therein mentioned," passed April 19, 1794, 3 Sm. L. 143, absolutely.

Section 10 of an act entitled "An act supplementary to the act, entitled 'An act directing the descent of intestates real estates, and distribution of their personal estates, and for other purposes therein mentioned,'" passed April 4, 1797, 3 Sm. L. 296, absolutely.

Section 11 of an act entitled "An act supplementary to the several acts of this commonwealth concerning partitions, and for other purposes therein mentioned," approved April 7, 1807, P. L. 155, absolutely.

An act entitled "An act to prevent devises and legacies from

lapsing in certain cases," approved March 19, 1810, P. L. 96, absolutely.

Section 1 of an act entitled "An act relative to dower, and for other purposes," approved April 1, 1811, P. L. 198, absolutely.

Section 11 of an act entitled "An act relating to registers and registers' courts," approved March 15, 1832, P. L. 135, absolutely.

Section 35 of an act entitled "An act relating to orphans' courts," approved March 29, 1832, P. L. 190, absolutely.

An act entitled "An act relating to last wills and testaments," approved April 8, 1833, P. L. 249, absolutely.

Section 2 of an act entitled "An act further to regulate proceedings in courts of justice, and for other purposes," approved May 6, 1844, P. L. 564, absolutely.

An act entitled "A supplement to an act relating to last wills and testaments, passed the eighth day of April, eighteen hundred and thirty-three, approved January 27, 1848, P. L. 16, absolutely.

Sections 7 and 11 of an act entitled "A supplement to an act, entitled 'An act relative to the LeRaysville Phalanx,' passed March, Anno Domini one thousand eight hundred and forty-seven, and relative to obligors and obligees, to secure the right of married women, in relation to defalcation, and to extend the boundaries of the borough of Ligonier," approved April 11, 1848, P. L. 536, absolutely.

Section 11 of an act entitled "An act relating to corporations and to estates held for corporate, religious and charitable uses," approved April 26, 1855, P. L. 328, in so far as it relates to estates, real or personal, bequeathed or devised.

Section 1 of an act entitled "An act to amend certain defects of the law for the more just and safe transmission and secure enjoyment of real and personal estate," approved April 27, 1855, P. L. 368, in so far as it relates to devises.

Sections 1 and 6 of an act entitled "An act relating to certain duties and rights of husband and wife, and parents and children," approved May 4, 1855, P. L. 430, absolutely.

Section 1 of an act entitled "An act relating to dowers," approved April 20, 1869, P. L. 77, absolutely.

An act entitled "A supplement to an act relating to last wills and testaments, approved the eighth day of April, one thousand eight hundred and thirty-three, providing for the time from which wills shall speak and take effect, for the vesting of lapsed or void

devises of real estate in the residuary devisee, and for the execution of powers over real and personal estate by the person in whom such powers are vested," approved June 4, 1879, P. L. 88, absolutely.

An act entitled "An act to enable mothers in certain cases to appoint testamentary guardians," approved June 10, 1881, P. L. 96, absolutely.

An act entitled "An act to enable mothers, in certain cases, to appoint testamentary gaurdians, being a supplement to an act, bearing the same title, approved June tenth, one thousand eight hundred and eighty-one, and also a supplement to an act, entitled 'An act relating to certain duties and rights of husband and wife, and parents and children,' approved May fourth, one thousand eight hundred and fifty-five," approved May 25, 1887, P. L. 264, absolutely.

Section 5 of an act entitled "An act relating to husband and wife, enlarging her capacity to acquire and dispose of property, to sue and be sued, and to make a last will, and enabling them to sue and to testify against each other in certain cases," approved June 8, 1893, P. L. 344, absolutely.

An act entitled "An act declaring the construction of words in a deed, will or other instrument importing a failure of issue," approved July 9, 1897, P. L. 213, in so far as it relates to devises or bequests of real or personal estate.

An act entitled "An act to amend section two of an act, entitled 'An act further to regulate proceedings in courts of justice, and for other purposes,' approved the sixth day of May, Anno Domini one thousand eight hundred and forty-four, relating to devises and legacies to brothers or sisters, or the children of brothers or sisters of any testator, and preventing the lapse thereof in the case of the death of such devisee or legatee during the lifetime of the testator," approved July 12, 1897, P. L. 256, absolutely.

An act entitled "An act relating to elections by surviving husbands or wives to take under or against the wills of decedents; to the recording thereof, and of final decrees, where parties have failed or refused to elect when required so to do; and forbidding payments to such parties until they have made and filed their election," approved April 21, 1911, P. L. 79, absolutely.

An act entitled "An act to amend section eleven of an act, entitled 'An act relating to corporations and to estates held for corporate, religious, and charitable uses,' approved the twenty-sixth

day of April, one thousand eight hundred and fifty five," approved June 7, 1911, P. L. 702, in so far as it relates to estates, real or personal, bequeathed or devised.

An act entitled "An act to amend an act approved the eighth day of April, one thousand eight hundred thirty-three, entitled 'An act relating to last wills and testaments,' by conferring the same rights upon the mother as upon the father," approved April 15, 1915, P. L. 124, absolutely.

An act entitled "An act to amend an act, approved the tenth day of June, one thousand eight hundred eighty-one, entitled 'An act to enable mothers in certain cases to appoint testamentary guardians,' by extending certain rights to mothers," approved April 21, 1915, P. L. 145, absolutely.

All other acts of assembly, or parts thereof, that are in any way in conflict or inconsistent with this act, or any part thereof, are hereby repealed, so far as relates to the estates, real and personal, of any person or persons dying on or after the thirty-first day of December, 1917.

THE REGISTER OF WILLS ACT

of

June 7, 1917 (P. L. 415).

PRELIMINARY NOTES BY COMMISSION.

In Section 5, the power of the register to revoke letters of administration is stated, in accordance with the existing law.

In Section 8, an additional remedy is provided where any person having in his possession or under his control a testamentary paper conceals or withholds the same.

In Section 9, the register is given additional power to subpoena witnesses.

In Section 16, the probate of a will or the refusal to probate it by a register is made conclusive unless an appeal be taken within two years instead of three as the present law provides, and the remedy is expressly limited to an appeal from the register's decree.

In Section 18, provision is made for the removal of contested will cases from the register's office to the orphans' court, in order to avoid the delays that sometimes occur under the present practice.

In Section 21 (*a*), it is provided that appeals from all the judicial acts of the register must be taken within two years, and that the period may be limited to six months in case of those parties who have actual notice by citation.

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254. TITLE.

AN ACT

Relating to the qualifications, jurisdiction, powers and duties of registers of wills, and regulating proceedings before said registers, and the costs thereof, the effects of their acts, and appeals therefrom.

255. OATH AND BOND OF REGISTER,—OATH.

SECTION 1. (a) Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same, That every person who shall be elected or appointed to the office of register of wills, before he shall enter upon the duties of the office, shall make oath or affirmation to support the constitution of the United States and the constitution of this commonwealth, and to perform the duties of the office of register with fidelity.

NOTE.—This is the first part of Section 1 of the Act of March 15, 1832, P. L. 135, 4 Purd. 4075, which was derived from the provisions of the federal and state constitutions, Section 3 of the Act of March 14, 1777, 1 Sm. L. 443; Section 1 of the Act of March 12, 1791, 3 Sm. L. 8; and Section 9 of the Act of April 6, 1830, P. L. 272.

In the first line, the words "elected or" have been inserted.

256. BOND,—FORM AND APPROVAL.

(b) 1. He shall also, with one or more sureties, to be approved by the judge or judges, if there be more than one, of the orphans' court of the county for which the register shall be elected or appointed, and also by the governor, give a joint and several bond to the commonwealth, in a sum equal to half the sum prescribed

by law for the official bond of the sheriff for the time being of the same county, with condition faithfully to execute the duties of his said office, and well and truly to account for and pay, according to law, all moneys received by him for the use of the commonwealth, and to deliver up the books, seals, records and other writings, belonging to his said office, whole, safe and undefaced, to his successor in office; which said bond shall be for the use of all persons concerned, and for the relief of all who may be aggrieved by the acts or neglect of such register.

NOTE.—This is the remainder of Section 1 of the Act of 1832. The provision of the Act of 1832 was that the sureties should be approved by "two judges of the Common Pleas." Section 2 of the Act of March 24, 1877, P. L. 37, 4 Purd. 4076, provided that in counties having separate orphans' courts the approval should be by the judge or judges of the orphans' court, except in counties having less than 300,000 inhabitants. Section 1 of the Act of April 27, 1911, P. L. 87, 6 Purd. 7297, amends the act of 1877 by omitting the proviso. There seems to be no good reason why this section should not apply in all counties. Where there is no separate orphans' court, the approval will be by the same judges as under the Act of 1832, but they will act in the matter as judges of the orphans' court, which seems appropriate.

257. ACKNOWLEDGMENT, RECORDING AND FILING OF BOND.

2. Every person elected or appointed as aforesaid shall cause the bond hereinbefore prescribed, being duly acknowledged by him and his sureties, before a judge of the orphans' court of the county, to be recorded by the recorder of deeds of the county, and as soon afterwards as convenient, to be transmitted into the office of the secretary of the commonwealth for custody, of which transmission he shall be entitled to receive the secretary's certificate, without fee or reward.

NOTE.—This is Section 2 of the Act of March 15, 1832, 4 Purd. 4075, which was founded on Section 1 of the Act of March 12, 1791, 3 Sm. L. 8.

It is now altered by inserting in the first line the words "elected or," and by substituting "judge of the orphans' court of the county" for "magistrate of the city or county respectively."

258. COPIES OF RECORD OF BOND AS EVIDENCE.

3. Copies of the record of the official bond of any register, acknowledged and recorded as aforesaid, and duly certified by the recorder of deeds for the time being, shall be good evidence,

in any action brought against him or his sureties, on such bond, according to its form and effect, in the same manner as the original would be, if produced and offered in evidence.

NOTE.—This is Section 3 of the Act of March 15, 1832, 4 Purd. 4076, which was founded on Section 1 of the Act of March 12, 1791, 3 Sm. L. 8.

259. PROVISIONS NOT TO APPLY TO CERTAIN COUNTIES.

4. The provisions of this clause shall not apply to registers of wills in counties having over eight hundred thousand and under one million five hundred thousand inhabitants according to the last preceding United States census.

NOTE.—This is inserted to exclude counties within the provisions of the Act of April 28, 1915, P. L. 198, 5 Purd. 5360.

260. NO LIABILITY ON BOND WHERE LETTERS GRANTED UNDER ORDER OF COURT.

(c) Whenever letters testamentary or of administration shall have been heretofore, or shall be hereafter granted by the register of wills of any of the counties in this commonwealth, by the direction and in pursuance of an order of the orphans' court, and conformably thereto, the said register and his sureties shall not be liable on the register's official bond for any loss or damage which may have accrued or which may hereafter accrue to any person in consequence of the compliance of said register with the said order of the orphans' court.

NOTE.—This is Section 10 of the Act of April 3, 1851, P. L. 305, 1 Purd. 1080.

261. DEPUTY REGISTER.

SECTION 2. Every register shall appoint and keep a deputy, to officiate in his absence, for whose conduct he and his sureties shall be accountable; and such deputy shall be capable in law to take the probate of wills and testamentary papers, and to grant letters testamentary and of administration, and to do whatever else by law appertains to the office of register.

NOTE.—This is Section 4 of the Act of March 15, 1832, 4 Purd. 4076, which was founded on Section 6 of the Act of March 14, 1777, 1 Sm. L. 443, with the addition of the provision as to liability of the sureties.

The words "testamentary papers" have been substituted for "testaments," and the words "testamentary and" have been inserted after "letters."

262. JURISDICTION OF REGISTER.

SECTION 3. Every register qualified to act, as aforesaid, shall have jurisdiction, within the county for which he shall have been elected or appointed, of the probate of wills and testamentary papers, of the granting of letters testamentary and of administration, of the passing and filing of the accounts of executors and administrators, and of any other matter whereof the jurisdiction may be at any time expressly annexed to his said office; and the act of any register, in any matter whereof another register has the exclusive jurisdiction, shall be void and of no effect.

NOTE.—This is Section 5 of the Act of March 15, 1832, 4 Purd. 4077, which was new in that act.

The words "elected or" have been inserted in line 3. The words "testamentary papers" have been substituted for "testaments" in line 4, and the words "and guardians" omitted in line 6.

Section 5 of the Act of April 6, 1791, 3 Sm. L. 20, 4 Purd. 4079, makes it the duty of the register to give notice of legacies to public corporate bodies. Section 66 of the Act of February 24, 1834, 1 Purd. 1100, imposed that duty upon the executors, and seems to have superseded the above section of the Act of 1791, which is therefore recommended for repeal. See the note to Section 18 of the Fiduciaries Act, (see 459-464 *supra*) which is founded on Section 66 of the Act of 1834.

See Cook's Est., 47 Pa. C. C. 84, 27 Dist. 1006.

263. BEFORE WHAT REGISTER WILL SHOULD BE PROBATED.

SECTION 4. Wills shall be probated only before the register of wills of the county within which was the family or principal residence of the decedent, at the time of his decease, and, if the decedent has no such residence in this commonwealth, then only before the register of the county where the principal part of the goods and estate of such decedent within this commonwealth shall be.

NOTE.—This is a new section, modeled upon Section 2 (a) (see 355 *infra*) of the Fiduciaries Act, which relates to the granting of letters testamentary and of administration.

"Section 4 of the Register of Wills Act of 1917 is mandatory in its requirement that wills shall be probated only before the register of wills of the county within which was the family or principal residence of the decedent at the time of his death, and, therefore, in view of the uncontradicted evidence that this testator's family residence at the time of his death was in Delaware County, the register of wills of Philadelphia

County had no jurisdiction to probate his will. See *Wall v. Wall*, 123 Pa. 545." *Gummev, J.*, in *Cook's Est.*, 47 Pa. C. C. 84, 27 Dist. 1006.

Where a testator has two residences in different counties, one in a city and one in the country, and lives in both of them at different times in the year, the question which of them is to be considered as his family or principle residence is one of intention. (See *Bumpus's Est.*, 23 Dist. 654, citing *Evan's Est.*, 17 Dist. 111.) and where such testator directs his attorney to state in the will, that he was a resident of the county in which his city house was situated, probate in that county will be sustained although he voted and paid the personal tax in the county where his country house was situated. *Winsor's Est.*, 47 Pa. C. C. 105, 27 Dist. 1010, 32 York 131; affirmed in 264 Pa. 552, 107 Atl. 888, on the ground that when decedent declared his residence in his will it was his last formal declaration of intention and he did nothing thereafter to indicate the choice of a different residence.

264. REVOCATION OF LETTERS OF ADMINISTRATION BY REGISTER.

SECTION 5. Any register of wills shall have power to revoke letters of administration granted by him whenever it shall be made to appear to him that such letters have been granted to, or on the nomination of, persons who are not the next of kin of the decedent entitled to administer, or whenever, after the granting of letters of administration, a will of the decedent shall be duly proved and admitted to probate.

NOTE.—This is a new section, intended to be declaratory of the existing law and to remove any possible doubt as to the original jurisdiction of the register in the cases mentioned, as distinguished from the revocation of letters testamentary.

See form 71.

Where letters of administration have been granted to a niece and nephew, there being no children, and without information to the register of other nieces and nephews, the register may revoke said letters in the interest of all concerned, and to correct an honorable misunderstanding.

In an appeal from decision of register revoking letters of administration, the court, in an opinion of Harman, J., said, *inter alia*:

"Prior to the passage of the Act referred to, (Sec. 5) there was no statutory enactment authorizing the register of wills to revoke letters, yet it was held in numerous cases since the old Act of 1832, which heretofore governed, that the register had a right to revoke the letters of administration for cause shown.

These decisions, (*Headley's Est.*, 39 Pa. C. C. 165, 21 Dist. 586; *McCaffrey's Est.*, 38 Pa. 331; *Shomo's Appeal*, 57 Pa. 356; *Neidig's Est.*, 183 Pa. 492) and many others of like import, establish the right of the register to revoke in the instances cited in the absence of any direct statutory enact-

ment giving him that power. And if Section 5 of the Act of 1917, referred to, was merely intended to be declaratory of the existing law, we seriously question whether the register is now limited in his power to revoke letters in the two instances cited in Section 5. He has said in the order filed revoking the letters that he does it "to correct an honorable misunderstanding in the granting of the letters in the first instance." Of the four reasons given by him in his order, this is the only one to which we are inclined to give serious consideration. The others seem to us to be without weight, and alone, would not justify his decree." *Sharpless' Est.*, 28 Dist. 746, 15 Del. 16, 20 Luz. 161.

A petition addressed to the orphans' court to revoke letters of administration, will be dismissed. Such petition must be addressed to the register of wills. The court, per Wilhelm, P. J., held, *inter alia*:

"Under the authorities cited it is our duty to dismiss this petition because the attempt to have the orphans' court exercise its jurisdiction is premature. This is the law as it stood before the Register of Wills Act of 1917, which contains this clause: (Section 5, *supra*.) This is a new section intended to be declaratory of the existing law and to remove any possible doubt as to the original jurisdiction of the register in the cases mentioned." *Wehry's Est.*, 47 Pa. C. C. 486, 15 Schuyl. 262, 33 York 68.

A register of wills, having admitted a will to probate and granted letters testamentary thereon, is without jurisdiction, upon the presentation of an alleged later will, to revoke said letters. A register of wills may revoke letters of administration improvidently granted but not letters testamentary. The orphans' court is without jurisdiction to review a register's decree admitting a will to probate except on appeal as provided by the Act of June 7, 1917, Section 21, P. L. 415. The court, per Corbet, P. J., held, *inter alia*:

"That the register was without jurisdiction to entertain the petition for the revocation of the letters testamentary referred to. Under Section 5 of the act last referred to, the register has power to revoke letters of administration granted by him, but no such power is given him with respect to letters testamentary." *Burtop's Est.*, 66 P. L. J., 65.

265. PROBATE OF NUNCUPATIVE WILLS.

SECTION 6. No nuncupative will shall be admitted to probate, nor shall letters testamentary thereon be issued till fourteen days after the day of the death of the decedent be fully expired, nor shall any nuncupative will, at any time, be admitted to probate, unless process have first issued to call in the surviving spouse of the decedent, if any, and such of his or her relations or next of kin as would be entitled to the administration of his or her estate in case of intestacy, to contest the same, if they please.

NOTE.—This is Section 10 of the Act of March 15, 1832, 1 Purd. 1068, which was derived in part from Section 5 of the Act of 1705, 1 Sm. L. 33. In the present draft, "surviving spouse" is substituted for "widow."

Section 11 of the Act of 1832, 1 Purd. 1068, also relating to nuncupative wills, is embodied in Section 4 (c) of the new Wills Act (see 220 *supra*.)

266. PROBATE OF COPIES OF WILLS PROVED IN OTHER STATES OR COUNTIES.

SECTION 7. Copies of wills and testaments proved in any other state, territory or possession of the United States of America, or any foreign country according to the laws thereof, and duly authenticated, may be offered for probate before any register having jurisdiction, and proceedings thereon may be had, with the same effect, so far as respects the granting of letters testamentary, or of administration with the will annexed, as upon the originals; and if the executor or other person producing any such copy shall produce also therewith a copy of the record of the proceedings for the probate of the original, and of the letters testamentary, or other authority to administer, issued thereon, attested by the person having power to receive the probate of such original, in the place where it was proved, with the seal of office, if there be one, annexed, together with the certificate of the chief judge or presiding magistrate of the state, country, county or district where such original was proved, that the same appears to have been duly proved, and to be of force, and that the attestation is in due form, such copies and proceedings shall be deemed sufficient proof, unless the contrary be shown, for the granting of letters testamentary or of administration with the will annexed, as the case may require, without the production or examination of the witnesses attesting such will.

NOTE.—This is Section 12 of the Act of March 15, 1832, 1 Purd. 1068, which was new in that act. The repeal of Section 1 of the Act of 1705, 1 Sm. L. 33, is recommended.

See form 46.

267. CITATION TO PERSON HAVING CUSTODY OF WILL; CERTIFICATION TO ORPHANS' COURT.

SECTION 8. The register having jurisdiction, as aforesaid, shall, at the instance of any person interested, issue a citation to any person having the possession or control of a testamentary writing, alleged to be the last will and testament of a decedent, requiring him to produce and deposit the same in his office for probate; and if such person shall conceal or withhold such writing, during the space of fifteen days, after being personally served with a

citation issued in the manner aforesaid, it shall be the duty of the register forthwith to certify the record of the proceeding to the orphans' court of said county, and the said court, upon petition of any person interested, shall proceed to enforce obedience to said citation by attachment as in cases of citation issued from said court.

NOTE.—This is Section 7 of the Act of March 15, 1832, P. L. 136, 1 Purd. 1067, which was new in that act.

The words following "manner and form aforesaid," and providing a remedy by attachment in the orphans' court, are submitted for the provision of the Act of 1832 that the person "shall be liable to an indictment as for a misdemeanor, or to an action for damages by the person aggrieved."

The provision quoted seems to be ineffectual, since no punishment for the "misdemeanor" is prescribed, and it would usually be difficult if not impossible to prove damages. It has been held that, under the Act of 1832, the orphans' court will not attach for failure to obey the citation issued by the register; McDonald's Est., 14 Phila. 253. The change recommended would therefore seem to be advisable.

See forms 32, 72.

"If the forgery (of a will) was personally known to the alleged testator, he could, if competent, clear up the matter by another will,—containing, if he chooses, merely a clause of revocation,—except in those rare cases where the alleged will would be irrevocable because contractually made upon sufficient consideration, in which event I have no doubt he could maintain a bill *quia timet*. So, too, it would lie at the instance of anybody in interest, if the alleged testator was incompetent. If the paper becomes known after his death, Sections 7 and 8 of the Act of March 15, 1832, P. L. 137, and Sections 8 and 9 of the Act of June 7, 1917, P. L. 415, provide a complete remedy to compel the production of the document, after which a caveat duly prosecuted would result in a conclusive determination of the question of validity, either by a decree of the register of wills or the orphans' court, or by judgment on the verdict of a jury after issue awarded. From such a proceeding the parties claiming under the alleged will could not withdraw, nor could they enter a discontinuance or suffer a nonsuit. In every contingency, therefore, we have a statutory proceeding, providing a complete and therefore an exclusive remedy." Per Mr. Justice Simpson in dissenting opinion in Fleming's Est., 265 Pa. 399, 109 Atl. 265.

268. SUBPŒNAS TO WITNESSES; ATTACHMENTS; WITNESS FEES AND MILEAGE.

SECTION 9. Whenever any testamentary writing shall be offered for probate, or application shall be made for letters testamentary or of administration, before any register having jurisdiction there-

of, such register shall have power to issue a subpoena, with or without a clause of *duces tecum*, to any person whose name may be subscribed to such testamentary writing as a witness, or who may be alleged to him to be otherwise capable of proving the due execution of such testamentary writing, or to any person who may be a material witness in the matter of such probate or of the granting of letters testamentary or of administration, commanding him, under a penalty of three hundred dollars, to appear before said register at his office, at a day certain, not less than five days from the service of such subpoena, and depose and testify what he may know concerning the execution of such writing or otherwise concerning such probate or the granting of letters; and if such person, being subpoenaed as aforesaid, shall refuse or neglect to appear as commanded, the register shall have power to issue an attachment against such witness to compel his appearance, or the party aggrieved may have an action against said witness to recover the said penalty, in the manner allowable by law in cases of subpoenas issued to witnesses by the courts of common pleas. Witnesses appearing before the register in obedience to subpoenas as aforesaid shall be entitled to the same fees and mileage as are allowed by law to witnesses in the orphans' court.

NOTE.—This is Section 8 of the Act of March 15, 1832, 1 Purd. 1067, which was new in that act. It is now extended to include applications for letters as well as for probate, and to apply to all witnesses and not merely the subscribing witnesses. A subpoena instead of a citation is provided for, and, by omitting words "such person being within the county, or within thirty miles of the office of said register," the subpoena is made to operate throughout the state. The provision for witness fees and mileage is new.

Under Section 8 of the Act of 1832, it has been held that the register has no power to summon any but the subscribing witnesses: *Burns's Will*, 11 Phila. 35; *Com. v. Bunn*, 71 Pa. 405.

See form 33. See *Fleming's Est.*, 265 Pa. 399, 109 Atl. 265. (See 267 *supra*.)

269. COMMISSIONS OR RULES TO TAKE DEPOSITIONS.

SECTION 10. On the application of any person interested, every register shall have power to issue commissions or rules to take the depositions of witnesses in other counties or states, or in foreign countries, in all cases within his jurisdiction.

NOTE.—This is Section 9 of the Act of March 15, 1832, 4 Purd. 4079, which was new in that act.

It is now altered by adding the words "or rules" after "commissions," and by omitting, at the end, the words "upon interrogatories filed in his office." The purpose of these changes is to permit the taking of depositions on rule, without written interrogatories.

See form 34.

270. RECORDING AND FILING WILLS; CERTIFIED COPIES.

SECTION 11. All original wills, after probate, and the copies of all original wills produced under the provisions of this act, shall be recorded and filed by the register of the respective county, and shall remain in his office, except when required to be had before a higher tribunal, by certiorari, or otherwise, and if removed for such cause, they shall be returned in due course to the office where they belong; and the copies of all the probates thereof, under the public seals of the courts or officers where the same may have been, or shall be so taken or granted respectively, except copies of probates of such wills and testaments as shall appear to be annulled, disproved or revoked, shall be adjudged and are hereby enacted to be matter of record, and good evidence to prove the gift or devise thereby made.

NOTE.—This is Section 17 of the Act of March 15, 1832, 1 Purd. 1072, which was derived in part from Section 1 of the Act of 1705, 1 Sm. L. 33.

271. WILLS OR PAPERS IN OTHER THAN ENGLISH LANGUAGE;—TRANSLATION TO BE FURNISHED, FILED AND RECORDED.

SECTION 12. (a) Any and all person or persons who shall offer for probate any will or codicil, or who shall offer any other written or printed instrument to be recorded in any register's office in this commonwealth, or to be filed in said office as required by law, which will, codicil or instrument shall be in any other than the English language, shall furnish at his, her or their expense, to the register, a sworn translation in English of such instrument, and the register shall attach or cause to be attached such translation to the original, and file both the original and the translation of record in his office, in all cases where filing is now or hereafter may be required by law; but in all cases where recording is now

or hereafter may be required, both the original and the translation in English shall be recorded.

NOTE.—This is founded on Section 1 of the Act of May 31, 1893, P. L. 188, 4 Purd. 4053, which act includes also deeds, mortgages, and other instruments to be recorded in any recorder's office or filed in any court of record.

There is a similar local act in Berks County (Act of February 27, 1872, P. L. 173) relating to wills.

272. EFFECT OF FAILURE TO FURNISH TRANSLATION.

(b) The register of wills shall not file or mark filed, record or mark recorded, any written or printed instrument in violation of this section, nor shall any paper filed or recorded in violation of this section be notice to any person in any legal proceeding whatever, nor be received or considered in evidence in any proceeding at law, in equity or in the orphans' court.

NOTE.—This is founded on Section 2 of the Act of May 31, 1893.

273. RECORDING INVENTORIES AND APPRAISEMENTS.

SECTION 13. It shall be the duty of the registers of wills of the several counties of this commonwealth to record all inventories and appraisements of the estate of any decedent, filed in the office of the register of wills by the executor or administrator of any such decedent's estate, in a book to be provided for that purpose; and the same shall be indexed by such register of wills, in an index book provided for that purpose; and true and attested copies or exemplifications of all such inventories and appraisements, so enrolled, certified under the hand and seal of such register of wills, shall be allowed in all courts, when produced, and are hereby declared and enacted to be as good evidence and as valid and effectual in law as the original inventory and appraisal themselves; and the said register of wills shall be allowed, for performing such duties, the same fees as are now allowed by law to such officers for performing similar services.

NOTE.—This is Section 1 of the Act of June 24, 1885, P. L. 155, 1 Purd. 1092.

Section 4 of the Act of April 19, 1856, P. L. 459, 4 Purd. 4080, provides: "It shall be the duty of every register of wills to keep a minute-book, duly indexed, in which shall be entered minutes, showing what papers

have been filed in his office, and also what collateral inheritance taxes have been paid, and on what estates."

Section 5 of the same act imposes the same duties on the register of Philadelphia County, but adds that he shall "receive therefor ten cents for making said entry of each paper, and each item of property briefly described; and for certificates thereof, the same fees as for recording done in his office, besides thirty-seven and a half cents for the seal."

The repeal of these sections is recommended as obsolete and unnecessary.

274. CERTIFIED COPIES OF BONDS, INVENTORIES, ACCOUNTS, ETC., TO BE FURNISHED BY REGISTER.

SECTION 14. It shall be the duty of every register to make and certify, under the seal of his office, true copies of all bonds, inventories, accounts, actings and proceedings whatsoever, remaining in his office, being thereunto required by any person having an interest therein, and to deliver the same, within a reasonable time, to such person applying therefor, on receiving the fee allowed to him by law for such copy or copies; and if any register shall refuse, after the tender of his lawful fees, to make or deliver such copy or copies as aforesaid, the orphans' court of the county may, on petition filed by the person so applying to the register, make and enforce such order upon said register as may be necessary to enforce his duty as aforesaid.

NOTE.—This is Section 32 of the Act of March 15, 1832, 4 Purd. 4079, which was Section 39 of the Commissioners' Draft and was "framed with a view to some provisions in the Act 27th March, 1713, Section 16 (1 Sm. L. 81) and also in the statutes 21 H. 8, c. 5, Section 5." In the present draft, the words at the end, beginning "the orphans' court," have been substituted for "he shall be deemed guilty of a misdemeanor in office." The remedy suggested seems more appropriate than an indictment or impeachment, and in the section as it now stands no penalty is provided for the misdemeanor.

275. FILING COPIES OF WILLS AND PROBATES IN OTHER COUNTIES.

SECTION 15. In any case in which a last will or testamentary paper shall have been duly proved before the register of wills for any county of this commonwealth, and shall relate to real estate in any county thereof, it shall be lawful to take from the office of such register a copy of said will or paper and of the probate thereof, duly certified by such register, under his seal of office, to be a full and perfect copy of the same, and to file the

said copy in the office of the register of wills in any county in which any of the real estate owned by the testator may be, which said register shall forthwith record the said copy. And the record of such copy shall be, and is hereby declared to be, as valid and effectual in law as the original will or paper after probate, or its duly certified copy, or its record would be for all purposes of vesting title, of evidence and of notice.

Like proceedings may be had at the instance of any party interested to obtain the certification of all subsequent proceedings appearing in the records of the register of wills concerning such probate.

NOTE.—This is Section 1 of the Act of April 23, 1889, P. L. 48, 1 Purd. 1073, altered by omitting, after “thereof” in line 4, the following words: “and the probate of this will has become conclusive respecting real estate, either by lapse of time or by judgment of the proper court having jurisdiction.” The reason for prohibiting the filing of copies in other counties during this period is removed by the addition of the last paragraph.

The word “copy” has been substituted for “exemplification,” since a copy certified by the register is all that the section requires, and an exemplified copy is ordinarily understood to be one authenticated in accordance with the Acts of Congress.

276. EFFECT OF PROBATE,—CONCLUSIVENESS.

SECTION 16. (a) The probate or refusal of probate by the register of the proper county of any will, or any other paper purporting to be a will or codicil thereto, shall be conclusive as to all property, real or personal, devised or bequeathed by such will or codicil or other paper, unless, within two years from the date of such probate or refusal of probate, those interested shall appeal from the decree of the register as herein provided: *Provided*, That all persons who would be sooner barred by this section taking immediate effect shall not be thereby barred before two years from the date hereof.

NOTE.—This is founded on Section 1 of the Act of June 25, 1895, P. L. 305, 1 Purd. 1072, which amended Section 7 of the Act of April 22, 1856, P. L. 533, by reducing the period from five years to three.

The Act of 1895 reads as follows:—

“The probate or the refusal of probate by the register of the proper county of any will, or any other paper purporting to be a will or codicil thereto, devising real estate, shall be conclusive as to such realty unless, within three years from the date of such probate or refusal of probate, those interested to controvert or sustain it shall, by caveat and action at law duly pursued, contest the validity of such will as to such realty or claim thereunder by such action duly prosecuted to final judg-¹

ment in favor of the plaintiff therein: *Provided*, That all persons who would be sooner barred by this section taking immediate effect shall not be thereby barred before two years from the date hereof."

In *Wilson v. Gaston*, 92 Pa. 207, the language of the Act of 1856 was criticised adversely, and it was held that the "action at law" referred to was an issue d. v. n., and an action of ejectment did not lie to contest the probate of a will. The word "caveat" is also inappropriate, since a caveat necessarily precedes "the probate or refusal of probate." In *Wall v. Wall*, 123 Pa. 545, it was held that the probate of a will might be collaterally attacked in ejectment where it appeared on the face of the proceedings that the register was without jurisdiction because the will was not signed at the end by the decedent. The ground of this decision was not the language of the Act of 1856, but the general rule that any judgment may be collaterally attacked for want of jurisdiction.

In the present draft, the section is made to apply to personal as well as real estate, the period is reduced from three years to two, and the words "appeal from the decree of the register as herein provided," are substituted for the provision as to "caveat and action at law."

The latter change is in accordance with the opinion in *Wilson v. Gaston*, *supra*, and does not interfere with the principle announced in *Wall v. Wall*, *supra*.

Cited in *Burtop's Est.*, 66 P. L. J. 765.

277. WHEN NO PROBATE WITHIN THREE YEARS; EFFECT AS TO CONVEYANCE OF REAL ESTATE.

(b) The last will of any decedent may be offered for probate at any time: *Provided*, That if such will shall not have been offered for probate within three years from the date of the death of the testator, the same shall be void and of no effect against a bona fide conveyance or mortgage of the real estate of said decedent, duly recorded before the date of the offering of said will for probate.

NOTE.—The proviso is founded on Section 1 of the Act of April 1, 1909, P. L. 79, 5 Purd. 5884; the first part is new, but declaratory of the present law.

278. PRECEPT BY REGISTER TO COMMON PLEAS FOR ISSUE d. v. n.

SECTION 17. Whenever a caveat shall be entered against the admission of any testamentary writing to probate, and the person entering the same shall allege as the ground thereof any matter of fact touching the validity of such writing, it shall be lawful for the register, at the request of any person interested, to issue a

precept to the court of common pleas of the respective county, directing an issue to be formed upon the said fact or facts, and also upon such others as may be lawfully objected to the said writing, in substantially the following form, viz:—

(L. S.) County, ss. The Commonwealth of Pennsylvania: To the judges of the court of common pleas of the said county, greeting: Whereas, A. B., on the _____ day of _____, in the year, etc., presented to G. H., our register of wills of said county, for probate, a certain writing hereto annexed, purporting to have been made the _____ day of _____, in the year, etc. (or otherwise describing the paper in question), which said writing the said A. B. avers is the last will and testament of the said C. D., and whereas E. D., who is a son and heir of the said C. D. (or intermarried with F. D., who is a daughter and heir, etc., according to the fact), hath objected before our said register that the said writing was procured by duress and constraint (stating the matters of fact objected), and whereas the said A. B. (or E. D.) hath requested that an issue may be directed into our said court to try by a jury the validity of the said writing, and the matters of fact which may be objected thereto in our said court; therefore, we command you that you cause an action to be entered upon the records of our said court, as of the day of the delivery of this our precept into the office of the prothonotary of our said court, between the said A. B. and the said E. D., so that an issue therein may be formed upon the merits of the controversy between the said parties, and tried in due course according to the practice of our said courts in actions commenced by writ; and further, that you cause all other persons who may be interested in the estate of the said C. D., as heirs, relations or next of kin, devisees, legatees or executors, to be warned, so that they may come into our said court and become party to the said action, if they shall see cause, and that you certify the result of the trial so had in the premises into the office of our said register.

Attest. G. H., Register of Wills of the said county.

And the facts established by the trial had and certified to the register as aforesaid, shall not be re-examined by the said register, nor upon any appeal from his decision.

NOTE.—This is Section 13 of the Act of March 15, 1832, 1 Purd. 1070, which was founded in part on Section 18 of the Act of April 13, 1791, 3 Sm. L. 28,

In line 10 the word "substantially" has been inserted. Section 43 of the Act of 1832, 1 Purd. 1072, reads: "No immaterial variation from the forms given and prescribed in and by this act, shall vitiate or render void any proceedings in which said forms shall be used." The form in the present section is the only one included in this draft, and it therefore seems unnecessary to re-enact Section 43, the word "substantially" being intended to have the same effect.

279. **CERTIFICATION OF RECORD TO ORPHANS' COURT ON ORDER OF COURT.**

SECTION 18. Where a caveat is entered against the probate of any last will or testamentary paper, or where there is a dispute as to such probate or as to the granting of letters testamentary or of administration, the orphans' court of the county in which said will or testamentary paper has been offered for probate or said letters testamentary or of administration have been applied for, may, by general rule or by special order in the case, on the petition of the register of wills of said county or of any party interested, direct said register to certify the entire record thereto pertaining to said court, which shall then determine whether the will or testamentary paper shall be admitted to probate or an issue devisavit vel non be directed to the court of common pleas of said county, or whether said letters testamentary or of administration shall be granted, in like manner as if the said will or testamentary paper had been admitted to probate, or said letters testamentary or of administration had been granted, by said register and an appeal been taken to the orphans' court from his decree. The record may be thus certified at any stage of the proceedings before the register, and after its removal to the orphans' court no letters of administration pendente lite shall be granted by the register except by leave of the orphans' court on cause shown by any party interested.

NOTE.—This is a new section, intended to prevent the needless and sometimes intentional delays which have often occurred in the prosecution of proceedings before registers.

Where a petition was presented under this section alleging testamentary incapacity and undue influence and an answer was filed denying the same and no testimony was taken, the Court, in refusing the petition, held, per Cummings, P. J.:

"From our examination of the section we are satisfied that the question of certifying the record is discretionary. The only question, therefore, for our decision, is, whether the court upon the presentation of a petition alleging undue influence and incapacity or unsoundness of mind,

which allegations are denied in answer, should certify the record, or whether the court under such circumstances should direct that the usual proceedings be had before the Register of Wills.

"After careful consideration and much thought we have decided that we will not exercise such discretion in favor of the petitioner for the reason should we do so we would be practically making a register's court out of the orphans' court. Under such circumstances as these, if we should so decide, any person might by the mere presentation of a petition upon mere allegation of want of capacity or undue influence, remove any proceeding from the register into the orphans' court. We are unable to see any reason whatever, from our examination of the record, why this proceeding should be removed.

"We are satisfied that the same will not be delayed if proceeded with in the regular way before the register, and in the event of any delay we are quite well satisfied that the register would ask that the same be certified." *Fonda's Estate*, 5 Northumberland 249.

Where the entire record pertaining to the application of letters, a caveat having been filed, was certified by the Register of Wills to the orphans' court under this section of the act, the matter in controversy being the legitimacy of an alleged son and heir of the decedent, and in this proceeding a petition was presented by the said alleged son under Section 18 of the Register of Wills Act asking that an issue *d. v. n.* be directed, the court held that the disputed fact was not material or essential to the determination of the question of the grant of letters of administration and refused to grant the issue. *Wand's Est.*, 50 Pa. C. C. 516.

When an order by the orphans' court upon the Register of Wills to certify the entire record of a proceeding before him, in accordance with Section 18 of the Act of June 7, 1917, P. L. 415, is lodged with him, his jurisdiction over the matter ends, and letters of administration *pendente lite* granted pursuant to an appointment made by him before service of the order are void and will be vacated. After service of the order the register may not act in the matter except by leave of court.

The register's appointment of a person as administrator *pendente lite* is not the equivalent of a grant of letters, and, hence, cannot be perfected by granting letters after service of the order.

When the provisions of Section 18 of the act are invoked, an appeal from the register does not lie, as the certification of the record and the disposition of disputed or controverted matters by the court *de novo* is a substitute for an appeal.

"Jurisdiction is in the register to grant letters of administration generally, including letters *pendente lite* under special circumstances, and the proceeding is well defined.

Section 4 of the Fiduciaries Act of June 7, 1917, P. L. 447, provides that the register 'may, when the circumstances of the case require, grant to any fit person or persons letters * * * *pendente lite*, security to be entered as in other cases of administration.' But Section 7, par. *a*, of said act, provides that before the register issue letters he shall administer an oath in the prescribed form. Section 8, par. *a*, provides that upon his

grant of letters he shall take a bond as there required. If he grant such letters (par. *d* of said section) without these prerequisites, 'such letters shall be void.' Letters are not to issue unless bond has been previously given: *Moore v. Rahm*, 2 S. & R. 375. In such a case, by the very terms of the law the letters are void: *Bradley v. The Com.*, 31 Pa. 522. Failure to take the oath at the time may not per se void the grant of letters, but failure to give the bond has a very different effect: *Beeber's Appeal*, 99 Pa. 596. The register having made his selection (*Hawkin's Orphans' Court Practice*, Sec. 28), the next steps are the oath and the bond, 'and thereupon the issue of the letters.'

"The register's appointment as of October 19 was not a grant of letters; it had no status as such by law or in practice. Before the register granted letters in compliance with the act, he was directed to certify the entire record to this court, it appearing that a caveat had been entered and a dispute as to the probate and grant of letters existed under Section 18 of the Register of Wills Act of 1917. This order was mandatory. From the moment of delivery, to the register his hand was stayed. He was directed to certify what had then been done. The attempted grant of letters on the 20th was, in the face of the order of the 19th, an illegal exercise of power over a matter no longer in his jurisdiction; for it is in this tribunal where from October 19 the questions will be determined whether the will shall be probated or an issue awarded, or whether letters pendente lite shall be granted. From this tribunal alone, after the date of delivery of the mandatory order, may the register have leave to grant letters of administration pendente lite.

"It is strongly urged that only by appeal has this court jurisdiction of the matters in dispute. Such was the law touching all acts of the register excepted to prior to Section 18 of the Act of 1917.

"This provision is new, and, say the commissioners, 'is intended to prevent the needless and sometimes intentional delays which have often occurred in the prosecution of proceedings before the registers.' This section, after providing that the orphans' court may direct the certification of the entire record, prescribes the course of procedure; this shall be 'in like manner as if an appeal had been taken from the register's decree.'

"The answer, therefore, to the contention that an appeal only can lie is in Section 18 itself. When its provisions are invoked, an appeal does not lie. The certification of the record and the disposition of disputes or controverted matters by this court *de novo* is a substitute for an appeal. There is in the proceeding a bar a mandatory order directing the register to certify an entire pending proceeding. The attempted exercise of power of appointment after this order is void.

"As Section 18 of the Register of Wills Act distinctly provides that, following the certification of a proceeding and its removal to the orphans' court, no letters of administration pendente lite shall be granted, except by leave of the orphans' court on cause shown by any party interested, application may now be made to this court by any person interested, with due notice to all persons interested to show cause why letters pendente lite should be granted, and if such cause be shown, the register will have leave to grant letters, after due notice to all parties interested

(Bieber's Appeal, 11 Pa. 167) to some fit and wholly disinterested person: Warner's Appeal, 207 Pa. 580." Henry's Est., 30 Dist. 945, 69 P. L. J. 737, 35 York 122.

**280. CERTIFYING RECORD TO ORPHANS' COURT,
WHERE THERE ARE DIFFICULT OR DIS-
PUTABLE QUESTIONS.**

SECTION 19. Where objections are made, or a caveat is entered, against the probate of any last will and testament, and no precept for an issue is directed by the register into the court of common pleas as aforesaid, or where objections are made to the granting of letters testamentary or of administration to any person applying therefor, or where any question of kindred or other disputable and difficult matter comes into controversy before any register, he may certify the entire record thereto pertaining to the orphans' court of the county, for the determination by said court of such disputable and difficult matter, giving convenient notice of the time when the matter will be heard in said court to all persons interested.

NOTE.—This is founded on Section 25 of the Act of March 15, 1832, 4 Purd. 4081, which provided for the appointment of a register's court to determine such matters. It has been held that the section was not repealed by the abolition of registers' courts by the constitution of 1874, and that such matters are now to be certified to the orphans' court: *Com. v. Clark*, 1 W. N. C. 330. The section has been revised accordingly.

The draft, instead of providing that the register "shall, at the request of any person interested, certify the entire record," etc., provides that the register *may* certify the record and omits the provision as to request by a person interested. The last preceding section of the draft provides a method for the compulsory removal of the record, and it seems best to make the certification under the present section discretionary with the register.

In the provision as to notice, the words "by citation or otherwise," following "said court," and the words "and to the judges of said court," after "persons interested," and, at the end, the words, "and in the meantime, he shall do and receive all proper acts preparatory to the business of said court," have been omitted as being inappropriate since the abolition of the register's court.

A paper purporting to be the will of decedent was offered for probate and it was objected to for the reason that it was not legible and therefore meaningless; that it was informal and there was no proof of its execution with testamentary intent; that the signature was not the signature of the decedent. *Held*, that (under the above section) there arose such a disputable question of fact as should be passed upon by the jury and should be

certified to the court of common pleas, that an issue might be framed to try the same.

In a proceeding under this section of the act where the register has certified the record to the orphans' court for the determination of disputable and difficult matter, the testimony of experts to aid the court in reading an alleged will may be heard if the characters are difficult to be deciphered or the language, whether technical or local or provincial or altogether foreign, is not understood by the court; in which case the evidence of persons skilled in deciphering writings, or who understood the language in which the instrument is written, or the technical or local meaning of the terms which are employed, is admissible to declare what are the characters or to translate the instrument or decipher the proper meaning of particular words.

Cross' Est., 1 Erie 83.

281. CAVEATS,—BOND.

SECTION 20. (a) It shall not be lawful for any register of wills, having jurisdiction of the probate of wills and the granting of letters testamentary and of administration within this commonwealth, to entertain, consider or regard any caveat against the probate of any last will and testament, or the granting of letters testamentary or of administration, or any appeal from the probate of any such will, or from the grant of any letters testamentary or of administration, unless such caveator or caveators, appellant or appellants, shall, within ten days after the filing of such caveat or appeal, enter into a bond, in the name of the commonwealth of Pennsylvania, with at least two sufficient sureties to be approved by the register, in a penal sum of not less than five hundred dollars and not to exceed five thousand dollars, as may be determined by the said register, conditioned for the payment of all or any costs which may be occasioned by reason of such caveat or appeal, and which may be decreed by such register or by the orphans' court to be paid by such caveator or appellant, which bond shall remain on file in the office of such register.

NOTE.—This is Section 1 of the Act of June 6, 1887, P. L. 359, 4 *Purd.* 4086.

See forms 3, 51-2.

The fixing of the amount of the bond to be filed by an appellant to the orphans' court from the decision of the register of wills admitting a will to probate, is the exercise of a judicial power, and on appeal to the orphans' court from the order of the register fixing the amount of such bond, the court is confined to a review of the discretion exercised by the register; and where this discretion has not been judiciously exercised, the register will be reversed. *Alexander's Est.*, 28 *Dist.* 993, 33 *York* 1.

282. FAILURE TO GIVE BOND.

(b) In case no bond, such as aforesaid, shall be filed with the register within ten days after the filing of any caveat or appeal, as aforesaid, such caveat or appeal shall be considered as abandoned, and shall be dismissed, and proceedings may be had in all respects as if no such caveat or appeal had been filed.

NOTE.—This is Section 2 of the Act of June 6, 1887 (P. L. 359), 4 Purd. 4087, the only change being to substitute “respects” for “cases” in the next to the last line.

283. COSTS ON CAVEAT OR APPEAL.

(c) Such registers of wills and the orphans’ court of the proper county, in all cases of appeal from the decree of the register, shall have power, and they are hereby directed, in all cases which may be instituted or adjudicated before them or any of them, and in all proceedings which may be had upon or by reason of any such caveat or appeal, to determine what amount of costs has been incurred or occasioned by the proceeding, and to direct by whom such costs shall be paid; and when such costs or any part thereof shall be finally adjudged and decreed to be paid by any caveator or appellant, as aforesaid, any party to whom such costs are due and payable, or who may have advanced money to pay the same as the proceedings shall have progressed, may institute an action in the proper court upon such bond for his own benefit, or that of all other parties interested, and may proceed thereon to final judgment and execution, if the same shall be necessary, as in other cases.

NOTE.—This is Section 3 of the Act of June 6, 1887, 4 Purd. 4087, modified by changing the word “direct” to “determine” in line 7, and by omitting after that word, “in the final order or judgment he or they shall make in each case.”

284. APPEALS FROM ORDERS AS TO SECURITY AND TAXATION OF COSTS.

(d) All the orders and decrees of the said register of wills relating to the amount and sufficiency of the security to be required by this section and to the taxation of costs in proceedings upon caveats and appeals before him, as aforesaid, shall be subject to the right of appeal to the orphans’ court of the proper county by or on behalf of any and every person, who may appear or have appeared before him as litigants, or who may be affected by such order or decree.

NOTE.—This is Section 4 of the Act of June 6, 1887, 4 Purd. 4087, except that, in line 3, "section" is substituted for "act," and "taxation" for "disposition," and, at the end, "or decree" is substituted for "of appeal," the latter words having apparently been used in the Act of 1887 by mistake.

Although under Section 20, sub-division (a) and (d) of the Register of Wills Act of June 7, 1917, P. L. 415, the orphans' court is confined to a review of the discretion exercised by the register of wills in fixing the amount of security to effect an appeal from his decision admitting a will to probate, the court will review the action of the register and reduce the amount of the bond where his discretion has not been judiciously exercised. *Alexander's Est.*, 28 Dist. 993, 33 York 1.

285. APPEALS TO ORPHANS' COURT,—PERIOD FOR APPEAL.

SECTION 21. (a) From all the judicial acts and proceedings of the several registers, including all decisions granting an issue *devisavit vel non* in a contest concerning the validity of a will, appeals may be taken to the orphans' court of the respective county within the term of two years: *Provided*, That any party entitled to appeal may be cited by such court to show cause why he should not appeal within six months from the date of such citation, and, on the failure of such party to show cause, said court may make an order limiting the time for such appeal by said party to said period of six months.

NOTE.—This is founded on Section 31 of the Act of March 15, 1832, 4 Purd. 4082, which was derived from Section 2 of the Act of September 30, 1791, 3 Sm. L. 58.

It is now modified as follows: The provision of the Act of February 28, 1905, P. L. 26, 6 Purd. 7298, allowing an appeal from the granting by the register of an issue *devisavit vel non*, is incorporated; the reference to a register's court is omitted; the period for appeal is reduced from three years to two; and the proviso is added to cover cases where parties entitled to appeal delay unreasonably in doing so.

See form 73.

A register of wills, having admitted a will to probate and granted letters testamentary thereon, is without jurisdiction, upon the presentation of an alleged later will, to revoke said letters. A register of wills may revoke letters of administration improvidently granted but not letters testamentary. The orphans' court is without jurisdiction to review a register's decree admitting a will to probate except on appeal as provided by the Act of June 7, 1917, Section 21, P. L. 415. *Burtop's Estate*, 66 P. L. J. 765.

Only the register of the county where decedent resided should grant letters on his estate.

A register from another county in such case may appeal from the decree of the register granting the letters.

In so holding, Gummey, J., said, *inter alia*: "When we examine the act which gives a right of appeal (Section 21 of the Register of Wills Act of 1917), we find that there are no restrictions as to the parties entitled to exercise that right. Of course the appeal must be taken by a party in interest: See *Curtis's Estate*, 253 Pa. 389. * * *

"That the Register of Wills of Delaware County has a pecuniary interest in the controversy must be conceded, as in the event of the will being probated in his county, he would be entitled to receive not only the fees which accrue to him by the act of probate, but also the compensation allowed him as the agent of the commonwealth for the collection of the collateral inheritance tax to which this estate is subject; but, passing this, it seems to me that the register of wills of every county is charged with the duty of seeing that the laws relating to his office are enforced and obeyed; for if the register of wills, in a matter of this kind, has not a right of appeal, who would have that right, if all of the beneficiaries under a will, with an intention to evade the law, probated a will in a county other than the one designated by the Register of Wills Act? It is one of the protections given to creditors that the provisions of the act shall be strictly followed. Creditors are charged with knowledge of the law, and, knowing the law, they would naturally look for the probate of a testator's will in the county which the law designated as the proper county for that purpose; but if the view here contended for should be sustained, it would not be difficult for an executor, by collusion with the beneficiaries, to probate in Allegheny County, or in any other county to which a passing fancy might lead them, a will required by law to be probated in Philadelphia County. * * * The appeal is sustained." *Cook's Est.*, 47 Pa. C. C. 84, 27 Dist. 1006. See, also, *Winsor's Est.*, 47 Pa. C. C. 105, 27 Dist. 1010, 32 York 131; affirmed in 264 Pa. 552, 107 Atl. 888.

286. EFFECT OF APPEAL.

(b) No appeal from any decree of the register, concerning the validity of a will or the right to administer, shall suspend the powers or prejudice the acts of any executor or administrator to whom letters have been granted.

NOTE.—This is founded on a part of Section 42 of the Act of March 15, 1832, 4 Purd. 4092, which relates to appeals from the register's (orphans') court, and is considered in the draft of the new Orphans' Court Act.

287. BILL OF COSTS.

SECTION 22. In counties wherein separate orphans' courts are now or may be established, the said courts shall establish a bill of costs to be chargeable to parties and to estates, for the probate of wills and testaments, and granting of letters testamentary and of administration, and for all the services of the register of wills of

such county in the transaction of the business of his office: *Provided*, That the tax to be paid to and received by the register for the use of the commonwealth shall not be less than the sum now or hereafter fixed by law: *And provided further*, That in counties wherein no separate orphans' courts have been or shall be established, the law as to fees to be charged by registers of wills shall remain as heretofore.

NOTE.—This is Section 1 of the Act of March 24, 1877, P. L. 37, 2 Purd. 1651, and 4 Purd. 4081.

The second proviso has been added in order to show that it is not the intention of the present draft to deal with the subject of fees and salaries of registers now regulated by Section 7 of the Act of April 2, 1868, P. L. 10, 2 Purd. 1650, Section 37 of the Act of March 15, 1832, P. L. 145, or local acts.

The Commissioners have considered it best not to attempt to include this subject or the subjects of the appointment of clerks, stenographers, etc., and their salaries.

288. PROCEDURE TO COLLECT COSTS.

SECTION 23. Whenever any proceedings before a register shall be wholly ended, and the fees and costs accrued thereon shall remain, during the space of thirty days thereafter, due and unpaid, such register may file a bill thereof, under his hand and the seal of his office, in the orphans' court of the county; and upon the docketing thereof, an execution may be issued in the name of the commonwealth, to levy the amount of the said bill, in like manner as executions may issue out of the orphans' court to enforce payment of decrees of that court for the payment of money.

NOTE.—This is Section 38 of the Act of March 15, 1832, 4 Purd. 4081, which was new in that act. In the second line, "or register's court" is omitted after "register."

In line 6 "orphans' court" is substituted for "common pleas," it seeming more appropriate that the remedy should be in the former court.

289. REGISTER TO COLLECT FIFTY CENTS FOR USE OF COMMONWEALTH.

SECTION 24. On the probate of any will, and the granting of letters testamentary thereon, also on the granting of any letters of administration, every register shall demand and receive for the use of the commonwealth, in each case, the sum of *one dollar*.¹

¹As changed from "fifty cents" by Act of April 16, 1921 (P. L. 94).

NOTE.—This is Section 36 of the Act of March 15, 1832, 4 Purd. 4081, which was stated by the Commissioners to have been derived from Section 5 of the Act of April 6, 1830, P. L. 272. The latter section is printed in 4 Purd. 4595. The repeal of Section 5 of the Act of 1830 is recommended.

290. SHORT TITLE.

SECTION 25. This act shall be known and may be cited as the Register of Wills Act of 1917.

291. REPEALER.

SECTION 26. The following acts and parts of acts of assembly are hereby repealed as respectively indicated. The repeal of the first section of an act shall not repeal the enacting clause.

Sections 1, 2, 5 and 8 of an act entitled "An act concerning the probates of written and nuncupative wills, and for confirming devises of lands," passed 1705, 1 Sm. L. 33, absolutely.

Sections 14, 15 and 16 of an act entitled "An act for establishing orphans' courts," passed March 27, 1713, 1 Sm. L. 81, absolutely.

An act entitled "An act for establishing in the city of Philadelphia, and in each county of this state, an office for the probate and registering of wills, and granting letters of administration, and an office for the recording of deeds," passed March 14, 1777, 1 Sm. L. 443, in so far as it relates to registers of wills.

Section 5 of an act entitled "An act to confer on certain associations of the citizens of this commonwealth the powers and immunities of corporations, or bodies politic in law," passed April 6, 1791, 3 Sm. L. 20, absolutely.

Section 2 of an act entitled "A supplement to the act, entitled 'An act to establish the judicial courts of this commonwealth, in conformity to the alterations and amendments in the Constitution,' " passed September 30, 1791, 3 Sm. L. 58, absolutely.

Section 5 of an act entitled "An act for the levy and collection of taxes upon proceedings in courts, and in the offices of register and recorder, and for other purposes," approved April 6, 1830, P. L. 272, absolutely.

Sections 1 to 5, inclusive, 7 to 13, inclusive, 17, 25, 31, 32, 36, 38, 39, 42 and 43 of an act entitled "An act relating to registers and registers' courts," approved March 15, 1832, P. L. 135, absolutely.

Section 10 of an act entitled “An act supplementary to an act passed the twenty-ninth day of March, one thousand eight hundred and thirty-two, entitled ‘An act relating to orphans’ courts,’ and relating to contracts of decedents and escheats in certain cases, and relative to the district court of the City and County of Philadelphia, and to registers of wills,” approved April 3, 1851, P. L. 305, absolutely.

Sections 4 and 5 of an act entitled “An act for the preservation of the records of the courts,” approved April 19, 1856, P. L. 458, absolutely.

Section 7 of an act entitled “An act for the greater certainty of title and more secure enjoyments of real estate,” approved April 22, 1856, P. L. 532, absolutely.

An act entitled “An act relating to the fees and official bond of the register of wills in counties wherein separate orphans’ courts are or may be hereafter established,” approved March 24, 1877, P. L. 37, absolutely.

An act entitled “An act to provide for the recording of inventories and appraisements of decedents’ estates by the register of wills,” approved June 24, 1885, P. L. 155, absolutely.

An act entitled “An act to authorize registers of wills and orphans’ courts to require security for costs, and to apportion costs in cases of caveats and appeals,” approved June 6, 1887, P. L. 359, absolutely.

An act entitled “An act to provide for the recording of exemplifications of wills relating to real estate in the office of the register of wills for any county of this commonwealth, in which said real estate is situate, and giving to the records of such exemplifications the same effect as the original wills or their duly certified copies or their records,” approved April 23, 1889, P. L. 48, absolutely.

An act entitled “An act requiring all public records within this commonwealth to be kept in the English language,” approved May 31, 1893, P. L. 188, in so far as it relates to wills and other instruments offered for probate or recording in the office of the register of wills.

An act entitled “An act amending section seven of an act, entitled ‘An act for the greater certainty of title and more secure enjoyments of real estate,’ approved twenty-second day of April, Anno Domini one thousand eight hundred and fifty-six, relating

to the time when the probate or refusal to probate a will shall be conclusive as to realty," approved June 25, 1895, P. L. 305, absolutely.

An act entitled "An act authorizing appeals to orphans' courts from decisions of registers of wills, granting issues *devisavit vel non* in cases of contested wills," approved February 28, 1905, P. L. 26, absolutely.

An act entitled "An act providing that the last will of any decedent, to be effective against *bona fide* conveyances or mortgages of the real or personal estate of the decedent, must be offered for probate within three years from the date of the death of the testator, or before the date of the recording of such conveyance or mortgage," approved April 1, 1909, P. L. 79, absolutely.

An act entitled, "An act to amend the second section of an act, approved the twenty-fourth day of March, Anno Domini one thousand eight hundred and seventy-seven, entitled 'An act relating to the fees and official bond of the register of wills, in counties wherein separate orphans' courts are or may be hereafter established,' by removing the restriction as to population of the counties affected by the act," approved April 27, 1911, P. L. 87, absolutely.

All other acts of assembly, or parts thereof, that are in any way in conflict or inconsistent with this act, or any part thereof, are hereby repealed.

THE INTESTATE ACT

of

June 7, 1917 (P. L. 429).

PRELIMINARY NOTE BY COMMISSION

In this revised act, the Commissioners have followed the phraseology of the existing statutes in accordance with their resolution to make, as a general rule, only such verbal changes as might be necessary where a substantive change of the law is intended.

It is well at this point to note two important changes which affect the entire act. The first is that the same scheme of inheritance is provided for both real and personal estate, thus ignoring the distinction that exists at present by which the interests of the surviving spouse or of parents are in some cases restricted to a life interest in the realty while their interests in the personal estate are absolute.

The reason for this distinction is purely historical; the common law rules of inheritance of real estate came through the feudal law, while the statutes of distribution of personal estate were derived through the Roman law, and were in England administered by the Ecclesiastical Courts and the Court of Chancery. Many of the resulting distinctions have long since been abolished in this commonwealth, and it is now suggested that a further step be taken, in thus providing that the interests of those entitled shall be in fee in both realty and personalty. However venerable the origin of the present law may have been, the Commissioners think that the difference has now become purely arbitrary and produces an artificial inequality. It is a pure accident whether at the moment of a man's death his property consists of lands or stocks and bonds, of ground rents issuing out of land or mortgages secured upon lands; all these are merely forms of property and the rights of heirs and next of kin should not be affected by matters of accident rather than of substance. Land, owing chiefly to its characteristic of immobility, may properly, and indeed sometimes must, be subject to different rules from personalty in such matters as the method of taxation or conveyance, the regulation of liens, mortgages or pledges; but in such cases there is an inherent reason for the difference, which finds no place in a logical plan of inher-

itance or succession. We, therefore, recommend to the legislature that all property where the owner dies intestate shall descend or be distributed according to one system. This, in the words of a distinguished legal scholar, Frederic W. Maitland, "is what a civilized jurisprudence requires, and here as always scientific jurisprudence is on the side of convenience and common sense."

The second important change which the Commissioners recommend is that the reciprocal rights of husband and wife in each other's intestate estate should be the same. Under the present law, the widow, if there be no issue, takes one-half of the real estate for life and one-half of the personal estate absolutely, and in addition, under the recent Act of April 1, 1909, P. L. 87, 5 Stew. Purd. 6476, five thousand dollars in real or personal estate as she may elect, before the division of the remainder of the estate. If there be issue, the widow takes one-third of the real estate for life and one-third of the personal estate absolutely. The surviving husband, on the other hand, if there be no issue takes all his wife's real estate for life as tenant by the curtesy, and all the personal estate absolutely, while if there be issue the husband divides the personal estate with the children share and share alike, that is he takes a child's share. These provisions are the resultant of the gradual growth and changes in our law during many years and their complexity is in practice greatly increased by the different rights given to the surviving husband and wife in electing to take against the will of the other; the wife having the right to take the same share of her husband's estate, real and personal, as she would have taken had he died intestate; while the surviving husband, in case he elects to take against his wife's will, has not the right to take as in cases of intestacy, but may choose either to take the real estate as tenant by the curtesy or the same share of her estate as she might take of his estate, in case she took against his will. There is no apparent reason why the reciprocal rights of husband and wife in each other's intestate estate should be so different, and the Commissioners are of opinion that they should be simplified; that there should be given to the surviving husband or wife, in case of intestacy, the same right in the estate, real and personal, of the other, and the same right in cases of testacy, to take under the intestate law. The Commissioners have embodied such a provision in their draft of the new Wills Act submitted herewith, and it is suggested that these changes will reduce our law upon the subject to a symmetrical and harmonious plan.

While they are not so fundamental, other changes are recommended which deserve particular notice.

In Section 1 (a), it is provided that where an intestate leaves a surviving spouse and issue one child only, or descendants of one child, the spouse shall take one-half instead of one-third of the estate.

In Section 2, the special allowance of \$5,000 to a surviving spouse where there is no issue is restricted to the case of actual intestacy, and no longer applies when the surviving spouse elects to take against the will. The procedure for the appraisement and setting apart of the property specially allowed is defined with greater exactness than under existing laws.

In Section 4, the rights of a surviving husband in remainder estates vested in his deceased wife are extended so as to be uniform with those of a surviving wife.

In Section 9, the distinction in the inheritance of real estate between the whole and half blood is abolished; and in Section 13 the rule at present surviving in some cases as to the restriction of inheritance to persons of the blood of the first purchaser is likewise abolished.

In Section 15, the right of inheritance in cases of illegitimacy is extended to the maternal grandfather, and illegitimate children are legitimated by the marriage of their parents without the present requirement of cohabitation.

In Section 16, the rights of adopted children are more accurately defined in accordance with the present legislative policy.

In Section 23, it is provided that no murderer shall inherit from the person whom he has killed—the present law on this subject seeming to the Commissioners to be opposed to the sentiments of morality.

Both this and the proposed Wills Act are made operative only upon the estates of persons dying on or after a day named, subsequent to the approval of the acts.

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292. TITLE.

AN ACT.

Relating to the descent and distribution of the real and personal property of persons dying intestate, and to provide for the recording and registering of the decrees of the orphans' court in connection therewith and the fees therefor.

"The Act of 1917 was the result of the efforts of a commission, appointed by the Governor of the Commonwealth, to codify, or assemble into one group, the numerous provisions on our statute books dealing with the intestate law and kindred matters; and the commission itself framed the act. The bill thus prepared was passed by the legislature without the slightest deviation from the recommendations of its draftsmen, so far as the portions having any bearing on this case are concerned; and, when the historical development of this branch of our statutory law is considered, together with the whole structure of the present statute, it is apparent that no radical changes or departures from preëxisting rules of inheritance were intended. On the contrary, the mischief to be corrected lay in the fact that there were too many acts covering the subject-matter, not that the rules there laid down were either wrong or undesirable, and the remedy intended, at least as to the sections here involved (see 322, 323, 324 and 343 *infra.*), was simply their codification, or putting together, in a single act. Of course, this combination of various legislative enactments into one statute necessitated the insertion of certain introductory parts, and, as already said, Section 10 is of that nature; it must be taken with the other parts, to which it is introductory, in order to ascertain its true meaning." Moschzisker, C. J. in opinion January 3, 1922, in Miles' Est., S. C. October Term, 1921, Nos. 61 and 62 (not yet reported).

293. SURVIVING SPOUSE AND ISSUE.

SECTION 1. Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the same, That the real and personal estate of a decedent, whether male or female, remaining after payment of all just debts and legal charges, which shall not have been sold, or disposed of by will, or otherwise limited by marriage settlement, shall be divided and enjoyed as follows: namely,—

294. SURVIVING SPOUSE AND ONE CHILD OR DESCENDANTS OF ONE CHILD.

(a) Where such intestate shall leave a spouse surviving and one child only, or shall leave a spouse surviving and no children

but shall leave descendants of one deceased child, the spouse shall be entitled to one-half part of the real and personal estate.

NOTE.—The introductory paragraph is copied from Section 1 of the Act of April 8, 1833, P. L. 315, 2 *Purd.* 1994, which was amended by the Act of April 1, 1909, P. L. 87, 5 *Purd.* 6476. Clause (a) is clause 1 of the same section, amended so as to make the rights of husband and wife the same and to eliminate the distinction between real and personal property in this regard, and to give the surviving spouse one-half of the estate under the circumstances described.

Section 1 of the Act of 1833 was derived from Sections 3 and 4 of the Act of April 19, 1794, 3 *Sm. L.* 143. The earlier acts provided, in substance, as follows: Act of 1683 (110th Law): "That the estate of an intestate shall go to his wife, his child, or children." Act of 1684 (172d Law): "One-third of the personal estate shall go to the wife; and one-third of the lands and tenements during her natural life; * * * and in case the intestate leaves no child, then half the personal estate to the widow, and the moiety of the real estate during her natural life." Act of 1693: "One-third to the wife, the residue among his children * * *; and if there be no children nor legal representatives of them, one moiety shall be allotted to the wife. * * * *Provided*, That where testators', or intestates' personal estates are sufficient to pay all debts," and so forth, "then the real estate to be distributed in manner following, * * * one-third of all intestates' lands to the wife for life." Act of 1705 (3 *Sm. L.* 156 n.): "One-third part of the said surplusage to the wife of the intestate. * * * And in case there be no children, nor any legal representatives of them, then one moiety of the said estate to be allotted to the wife of the intestate."

Section 8 of the Act of 1705 provided: "That the surplusage or remaining part of the intestate's lands, tenements and hereditaments * * * shall be divided between the intestate's widow and children, or the survivors of them, who shall equally inherit and make partition, as tenants in common may or can do. But if the intestate leaves a widow and no child, then such widow or relict shall inherit one moiety or half part of the said lands and tenements."

Section 10 of the Act of 1705 provided: "That nothing in this act contained shall give any widow a right or claim to any part of such lands or tenements, for her dower or thirds, as shall yield yearly rents, or profits, whereof her husband died seized, for any longer time than the term of her natural life; which dower she shall hold as tenants in dower do in England."

Section 2 of the Act of March 23, 1764 (3 *Sm. L.* 159 n.) provided: "That the shares and purparts of intestates' real estates which by the act for settling intestates' estates aforesaid are given to widows, shall be construed and understood to be estates for their natural lives, respectively, and not otherwise."

Section 5 of the Act of April 4, 1797 (3 *Sm. L.* 296) provided: "That where any woman shall hereafter die intestate" leaving a husband, "he shall take the whole personal estate, and the real estate shall descend

and go in the same manner as is directed in the case of men dying intestate, saving to the husband his right as tenant, by the curtesy."

In this section, the Commissioners have introduced a change which they consider a much needed improvement. The Act of 1833 provides for two cases: first, where there is no issue, and second, where there is issue. This clause provides for the case where there is issue one child, or the descendants of one child only; in which case the surviving spouse will take not one-third, but one-half of the estate. It seems unjust where a man dies leaving a widow and one child, often a minor, that the single child should receive twice as much as its mother, and many cases of hardship have been observed in practice. In *Rowan's Estate*, 132 Pa. 299, an adopted child was thus held entitled to two-thirds of the estate as against the widow.

In this section and throughout the act the Commissioners have used the words, "surviving spouse," in place of "widow or surviving husband," and the like, believing that the use of one word is preferable when there can be no mistake as to the meaning, and where the interests of widow and husband are made the same, as it is now suggested they should be.

"The Intestate Act of June 7, 1917, P. L. 429, places the husband and wife on a parity as to inheritance from each other." Per Williams, J., in *Caldwell v. Caldwell*, 70 Super. 332, p. 336.

295. SURVIVING SPOUSE AND MORE THAN ONE CHILD OR DESCENDANTS OF MORE THAN ONE CHILD.

(b) Where such intestate shall leave a spouse surviving and more than one child, or one child and the descendants of a deceased child or children, or the descendants of more than one deceased child, the surviving spouse shall be entitled to one-third part of the real and personal estate.

NOTE.—This is a new clause, further amending clause 1 of Section 1, of the Act of 1833, along the same lines.

See *Commonwealth v. Rife*, 50 Pa. C. C. 22.

296. SURVIVING SPOUSE AND NO ISSUE BUT COLLATERAL HEIRS,—ALLOWANCE OF \$5,000 AND ONE-HALF OF REMAINING ESTATE.

SECTION 2. (a) Where such intestate shall leave a spouse surviving and other kindred, but no issue, the surviving spouse shall be entitled to the real or personal estate, or both, to the aggregate value of five thousand dollars, in addition, in the case of a widow, to the widow's exemption as allowed by law; and, if such estate shall exceed in value the sum of five thousand dollars, the sur-

viving spouse shall be entitled to the sum of five thousand dollars absolutely, to be chosen by him or her from real or personal estate, or both, and in addition thereto shall be entitled to one-half part of the remaining real and personal estate: *Provided*, That the provisions of this clause *as to said five thousand dollars in value** shall apply only to cases of actual intestacy of husband or wife, entire or partial, and not to cases where the surviving spouse shall elect to take against the will of the deceased spouse.

NOTE.—This is clause 11 of Section 1 of the Act of 1833, as amended by the Acts of April 1, 1909, P. L. 87, 5 Purd. 6476, and July 21, 1913, P. L. 875, 5 Purd. 6478, further amended so as to apply expressly to husband as well as wife, so as to be limited to cases of actual intestacy, and so as to make the estate of the surviving spouse absolute in real as well as personal property.

The words "collateral heirs" are omitted in the second line, as they exclude parents and grandparents.

In accordance with their view that the interests of the surviving husband and wife should be the same, the Commissioners have made the provisions of the Act of April 1, 1909, apply equally to both cases. The special allowance of \$5,000 where there is no issue, conferred upon the widow by this act, appears to have been favorably considered during the time it has been in operation, and no change in the amount is suggested. The Act of April 1, 1909, was most probably not intended by the legislature to apply to the case of a husband who should elect to take against the will of his wife (there being no issue), but this result followed logically from a consideration and comparison of the Acts of April 8, 1833, P. L. 315, April 11, 1848, Section 11, P. L. 536, and May 4, 1855, Section 1, P. L. 430, as shown in *Buckland's Estate*, 239 Pa. 608; *Moore's Estate*, 50 Super. Ct. 76.

A result of the Act of 1909 in connection with prior legislation is that a married person having no issue whose estate amounts to \$5,000 or less cannot make any testamentary disposition of his or her estate. The Commissioners recommend in this section that the special allowance of 1909 shall be made only in cases of actual intestacy, and not where the surviving spouse elects to take against the will of the deceased spouse.

See *Shoch's Est.*, 271 Pa. 158 aff'g. 29 Dist. 163.

Under the Intestate Act of June 7, 1917, P. L. 429, Section 2 (a), when a husband dies intestate leaving a widow, but no issue, the share to which the widow becomes entitled vests in her absolutely as an inheritance, and on the death of the widow, intestate, passes to her next of kin.

In such case her next of kin are entitled to have \$5,000 in value of the husband's estate appraised and set apart for their benefit, although no claim therefor was made by the widow in her lifetime. *Nolan's Est.*, 68 P. L. J. 588, 21 Lack. 239, 2 Erie 211, 9 Lehigh 57.

*Amended by Act of July 11, 1917 (P. L. 403).

The \$5,000 preference allowed to a widow under the Act of June 7, 1917, P. L. 429 (Intestate Act), is a vested interest in her at the death of her husband, and this she cannot be deprived of except by her own act. If the widow dies without having made any demand for it in her lifetime, her next of kin are entitled to claim it after her death, and the claim may be made for them by her personal representative. *Desmond's Est.*, 28 Dist. 231, 36 *Lanc.* 217, 8 *Leh.* 255.

"The controlling distinction between the law relating to the \$500 exemption and the \$5,000 allowed to widows under the Act of 1917 is that the \$5,000 worth of property, real or personal, vests in the widow at the death of her husband, and does not require any action on her part to secure the same.

"The \$500 exemption does not vest at the death of the husband, but only when she has elected to exercise the right, and this her executor or administrator cannot do for her after her death." Per Maxwell, P. J., in *Desmond's Est.*, 28 Dist. 231, 36 *Lanc.* 217, 8 *Leh.* 255.

(Note.—It would seem to be improper practice to join in one petition a claim for an allowance of \$5,000 and a claim for the exemption of \$500.—Editor.)

A common law marriage with decedent duly proven to the satisfaction of the court will enable the widow to successfully claim the allowance. *Wandall's Est.*, 29 Dist. 1132.

A mere irregularity in a divorce proceeding, rendering the decree voidable, but not void, especially under attack by one not a party, will not deprive the widow of her right to the allowance. *McDonald's Est.*, 268 Pa. 486, 112 *Atl.* 98, reversing 1 *Wash.* 10, 49 Pa. C. C. 423.

A widow electing against her deceased husband's will is excluded from the benefits of the special allowance of \$5,000 under Section 2 (a) of the Intestate Act of June 7, 1917, P. L. 429, as amended by the Act of July 11, 1917, P. L. 755.

The plain intention of these statutes to exclude from the benefit of the special allowance a spouse electing to take against the will of the deceased spouse prevails against the less certain provision of Section 23 of the Wills Act of June 7, 1917, P. L. 403.

Section 2 (a) of the Intestate Act and its amendment of July 11, 1917, are not in conflict with Art. III, Sec. 3, of the Constitution, as the title of the Intestate Act is sufficiently germane to the body of the act. *Colom's Est.*, 47 Pa. C. C. 434, 28 Dist. 503. See, also, *Pfanenschmidt's Est.*, 35 *Montg.* 135; *Langerwisch's Est.*, 47 Pa. C. C. 121, 28 Dist. 470, 8 *Leh.* 147, affirmed in 267 Pa. 319, 110 *Atl.* 165.

Where a man dies after the passage of the Act of July 11, 1917, P. L. 755, which amended the Act of June 7, 1917, P. L. 429, leaving to survive him a widow and collateral kin, and leaving a will by which he directed his estate to be distributed in accordance with the intestate laws, and by which he directed his executrix, the widow, to convert into money all his real and personal property, and the widow elects to take under the will, the court will refuse the widow's petition for the appointment of appraisers to set apart real and personal property to the value of \$5,000; but the dismissal of the petition will be without prejudice to the right of the

widow to enforce her claim by taking credit therefor in the settlement of her account as executrix, and urging it upon final distribution.

Such a case is not one of intestacy, and therefore the Acts of June 7, 1917, P. L. 429, and July 11, 1917, P. L. 755, have no application, since they relate solely to the descent and distribution of the real and personal property of persons dying intestate.

Where, as here, the widow takes in money, no appraisement is necessary. *Carrell's Estate*, 264 Pa. 140.

Under subdivision (a) as amended June 11, 1917, P. L. 755, and subdivisions (b) and (d) of Section 2 of the Intestate Act of June 7, 1917, P. L. 429, the collateral heirs cannot control in their own interest the election of a spouse to take certain property for his or her special allowance of \$5,000.

"Nowhere in the act is there any restriction upon the freedom of its beneficiary to choose the property of the estate he or she will take in satisfaction of this portion of the inheritance it provides, but on the contrary, the act expressly directs that the portion shall 'be chosen by him or her from real or personal estate, or both.' In a case under the Widow's Exemption Act of 1851, it was ruled that a creditor of an insolvent could not control the widow's election to save himself from loss: *Graves's Estate*, 134 Pa. 377. A fortiori, the collateral heirs who are mere volunteers, cannot control in their own interest the election of the favored heir under the Intestate Act." *Barnett, P. J., in Troutman's Est.*, 30 Dist. 708.

Where a widow makes her will, marries a second time, and dies leaving in existence the will made prior to her second marriage, her surviving husband is entitled under the Wills Act of June 7, 1917, P. L. 403, and the Intestate Act of June 7, 1917, P. L. 429, as amended by the Act of July 11, 1917, P. L. 755, to the allowance of \$5,000 provided by the Intestate Act. By her remarriage her will, as to her second husband, was annulled, and there was an actual intestacy as to him. *Shestack's Estate*, 267 Pa. 115, 110 Atl. 166.

Intestacy may result not merely from the testator's failure to make a will at all, or from his failure to dispose in his will of all his estate, but also from his failure to make a legal and effectual disposition of either his entire estate or a portion of it.

Where a charitable bequest of the residuary estate is void under the Wills Act of June 7, 1917, Sec. 6, P. L. 403, because of the death of the testator within thirty days after making the will, there is an actual, although partial, intestacy within the meaning of the Intestate Act of June 7, 1917, Sec. 2 (a), P. L. 429, as amended by the Act of July 11, 1917, P. L. 755, which gives the surviving spouse of an intestate (there being no issue) a special allowance of \$5,000 out of the real or personal estate, in addition to the one-half of the remaining estate. *McNulty's Estate*, 29 Dist. 709.

On a petition for the widow's claim for \$5,000 under the Intestate Act of July 11, 1917, Section 2, P. L. 755, which she claimed from the real estate left by the decedent, consisting of two properties, appraisers were appointed and appraised the properties at \$15,000. One of the next of kin filed exceptions to this appraisement, and a bona fide written offer of \$20,000 was made for the properties, and it appeared that the property

next door, consisting of a property similar to one of these, had been sold for \$15,000. Under these facts the court refused to approve the appraisal and ordered the appraisers to make a reappraisal. Brady's Estate, 29 Dist. 24.

The constitutionality of the amending Act of July 11, 1917, having been attacked, the Supreme Court, in a per curiam opinion, affirming Langerwisch's Estate, *supra*, said:

"Diedrich Langerwisch died testate February 3, 1919, leaving a widow, but no issue. She elected to take against his will, and claimed such interest in his real and personal estate as would have passed to her if he had died intestate. Her claim, disallowed by the court below, was for \$5,000 out of her husband's real or personal estate, in addition to the exemption allowed her by law. It was disallowed, because Section 2, clause (a), of the Act of June 7, 1917, P. L. 429, as amended by the Act of July 11, 1917, P. L. 755, provides the 'clause as to said five thousand dollars in value shall apply only to cases of actual intestacy of husband or wife.' On this appeal the sole contention of the appellant is that the amending act is unconstitutional, in that it violates Section 3 and Section 7, clause 16, of Article III, of the Constitution. It is entitled, 'An act to amend Section two clause (a) of the Intestate Act of one thousand nine hundred and seventeen, approved June seventh, one thousand nine hundred and seventeen, by inserting in the proviso to said clause the words 'as to said five thousand dollars in value.' This title contains but one subject, which is 'clearly expressed' and the act is a general law, not a local or special one, 'changing the law of descent or succession.' This is too plain for discussion." Langerwisch's Est., 267 Pa. 319; 110 Atl. 165.

The fact that the Orphans' Court Partition Act of 1917 (P. L. 338), in Sections 15, 18 and 29 appears to concede to the widow a lesser estate in lands of the decedent than that conferred by the Intestate Act of 1917 (P. L. 431), approved the same day, does not in any way affect the quantum of the estate taken by the widow under the latter act. If there were any conflict between the two acts, the Intestate act must govern as to the interest taken, the Partition Act having to do merely with procedure, and the enforcement of rights conferred by the Intestate Act. But the alleged conflict is only apparent, and the references in the Partition Act to the life estate of the widow are evidently intended to refer to estates of persons dying prior to the Intestate Act of 1917.

"Under Section 2 (a) of the Intestate Act of 1917, P. L. 431, the widow is apparently entitled in fee to an undivided one-half part or interest in decedent's real estate; while Sections 15, 18 and 29 of the Orphans' Court Partition Act of 1917, P. L. 337 (approved the same day as the last mentioned statute) appear to concede to the widow but a lesser share in said lands, to wit, a life estate only; the respondent in its answer directing our special attention to certain language appearing in said last named act, to wit, in Section 15, the words 'where by existing laws the widow is entitled to a dower of one-third in the real estate and * * * where by existing laws the widow is entitled to a dower of one-half in the real estate,' and in Section 18, the words 'should the widow of the decedent be

* * * entitled to a life estate in one-half or one-third of the real estate under the intestate laws, or should such widow elect to take against the will of the decedent and thereby be entitled to such a life estate' and in Section 29, the words 'if there be a widow entitled to a life interest in such real estate under the intestate laws, or should such widow elect to take against the will and thereby be entitled to such life estate.'"

"As the decedent, William S. Dodd, whose estate is before us, died on September 19, 1920, to wit, long after December 31, 1917, the date upon which the Wills Act of 1917, P. L. 403, and the Intestate Act of 1917, P. L. 429, both became operative, this estate, its administration and devolution, are therefore manifestly subject to the control of these two statutes. We are, therefore, clearly of the opinion that the petitioner, as widow of the decedent, upon her electing to take against her husband's will became, under Section 23 of the said Wills Act of 1917, P. L. 403, and under Section 2 (a) of the said Intestate Act of 1917, P. L. 429, entitled to and invested with, an undivided one-half part, share or interest in fee simple, in said decedent's real estate; and that the cited portions of the said Orphans' Court Partition Act of 1917, P. L. 337 (15, 18 and 29), do not and are not designed to diminish such fee simple share, part or interest so prescribed for the widow in and by the said Wills Act and Intestate Act." * * * "It is the intestate laws of the commonwealth which determine all matters pertaining to the descent and inheritance of estates of decedents; fixing the character, kind, quantity and amount of the interests of shares in decedents' real and personal property which shall pass to and vest in surviving spouses and kinsmen. The Partition Acts merely provide the method for enforcing the rights so conferred by the Intestate Acts. Hence, it follows that on general principles, were there indeed a clash or conflict between the provisions of the Intestate Act of 1917, P. L. 429, and of the Orphans' Court Partition Act of 1917, P. L. 337, on a matter of quantity, size, amount of shares or interests of a decedent's estate to descend or vest, the latter statute (merely prescribing procedure) would, of necessity yield to the former statute as to matters so lying exclusively within the scope and province of the said Intestate Act.

"However, the respondent, in its answer, has not directed our attention to or shown that there really exists any clash or conflict between the two statutes under consideration. By its express terms, the Intestate Act of 1917, P. L. 429, becoming operative and effective on December 31, 1917, is made to apply to estates, real and personal of all persons dying intestate on or after the said day so designated; expressly providing that as to the estates, real and personal, of persons dying before the day designated, the existing laws should remain in full force and effect. Under Section 1 of the Act of April 8, 1833, P. L. 316, which applies to and controls the devolution of estates of intestates dying before December 31, 1917, a surviving widow was entitled to certain interests in her husband's real estate for life only, to wit, so-called statutory dower, i. e., a life estate in a third or a half part of such lands, depending on whether the decedent had left any children or issue. The Intestate Act of 1917, P. L. 429, gives the widow of an intestate dying on or after December 31, 1917, not statutory dower as under the old law, but certain interests in fee simple in the decedent's real estate, to wit, an undivided one-third part thereof or an

undivided half part thereof or more, depending on whether or not the decedent leaves children or issue, and if so, the number thereof. The Orphans' Court Partition Act had to be drafted by the lawmakers to meet the circumstances and requirements of the estates of all intestates, to wit, those dying before, as well as those dying after December 31, 1917; for such act was to apply to estates of decedents irrespective of the dates of their respective deaths. Now, as to widows of intestates dying after December 31, 1917, no special mention of the shares of such widows therein was in such act necessary; for, thereunder surviving spouses taking shares in fee, such shares are of precisely the same character and quality as, and, therefore, fall in the same category with, the other shares and interests vesting in the decedent's descendants or collateral kinsmen. The said act, however, had to make and preserve special provision for the statutory dower of widows of husbands dying prior to December 31, 1917, which circumstance accounts for and explains the use of the pointed out language appearing in Sections 15, 18 and 29 of the said act. The purpose and necessity for such provisions and language is manifest, to wit, being designed and required to provide for the life interests of widows in estates of intestates dying before December 31, 1917, and in estates of testates dying before said date, where the widows elect to take against the wills of their respective husbands. Accordingly we reach the conclusion that there exists no clash nor conflict between the provisions of the Orphans' Court Act of 1917, P. L. 337, and the Intestate Act of 1917, P. L. 429; at least as to any matter to which the petitioner has directed our attention. It is well to observe, moreover, in passing that did indeed such conflict exist between the provisions of the two statutes under consideration, the provisions of the Orphans' Court Partition Act of 1917, P. L. 337, aside from its being a mere possessory action, would, for another important reason, be legally forced to yield to the pertinent provisions of the Intestate Act of 1917, P. L. 429, as to all matters within the scope of the last mentioned statute; for, the latter act, although approved the same day as the former act became operative long after the said Orphans' Court Partition Act had become law; so that the Intestate Act thus later becoming operative, would automatically and of necessity supersede such provisions of the Partition Act, if any, in conflict with the provisions of the said Intestate Act." *Dodd's Estate*, 1 Wash. 236.

297. APPRAISEMENT AND APPRAISERS.

(b) The appraisement and setting apart of the said five thousand dollars in value of property shall be made by two appraisers, who shall be appointed by the orphans' court having jurisdiction of the accounts of the personal representatives of such intestate, and shall be sworn or affirmed to appraise the property which the surviving spouse shall choose under the provisions of this act. Each of such appraisers shall receive, as compensation for each day or fraction thereof necessarily employed in the performance

of their duties, the sum of two dollars and fifty cents, and such additional amount as may be allowed by said court.

NOTE.—This is founded on the Act of April 1, 1909, P. L. 87, 5 Purd. 6476, as amended by the Act of July 21, 1913, P. L. 875, 5 Purd. 6478, further amended so as to provide for the appointment by the orphans' court of two appraisers, for the swearing or affirming of such appraisers, and for their compensation.

The Commissioners have concluded that the appraisement of the property chosen by the surviving spouse to be awarded under this act should be made by appraisers appointed by the court rather than by the appraisers of the "other personal estate," as is now the law. In many cases, where real estate is selected, the regular appraisers are not necessarily qualified to value it, and as the rights of the heirs are involved, it seems best that the appraisers should be formally appointed.

In this and other clauses of the act relating to this special allowance, the Commissioners have avoided any reference to the procedure under prior acts of assembly relating to the widow's exemption, which introduced a needless complication in the Act of April 1, 1909.

See Desmond's Est., 28 Dist. 231, 36 Lanc. 217, 8 Leh. 255.

The orphans' court possesses no jurisdictional authority to appoint appraisers to appraise and set aside estate property claimed as and for a \$5,000 allotment for the surviving spouse of an intestate dying before December 31, 1917; the power of the said court being limited and confined to appointing substitute appraisers to take the place of estate appraisers appointed by the personal representatives of the estate but who are unable to act. Hilton's Est., 1 Wash. 125.

Under subdivision (a) as amended June 11, 1917, P. L. 755, and subdivisions (b) and (d) of Section 2 of the Intestate Act of June 7, 1917, P. L. 429, the collateral heirs cannot control in their own interest the election of a spouse to take certain property for his or her special allowance of \$5,000.

No appeal is given from the report of the appraisers fixing the value of the property from which a spouse elects to take his or her special allowance, and in the absence of fraud or collusion or such clear undervaluation of the property as may suggest fraud or collusion, the valuation fixed by the appraisers will not be interfered with.

The mere fact that one of two appraisers was a second cousin of the widow is not ground for setting the appraisement aside.

"No appeal is given from the report of the appraisers. They are the tribunal created by the act for the purpose of appraising the property the spouse elects to take under this section, and in the absence of fraud or collusion, or of such clear undervaluation of the property as may suggest fraud or collusion, their valuation should not be interfered with." * * * "The fifth exception is likewise without merit. One of the two appraisers was a second cousin of the widow. But in Vandevort's Appeal, 43 Pa. 462, two of the three appraisers were brothers-in-law of the widow,

and it was held by the Supreme Court that 'the mere fact of the relationship of two of three appraisers to the decedent or the widow is not enough to avoid their proceedings.' Barnett, P. J., in Troutman's Est., 30 Dist. 708.

298. CONFIRMATION OF APPRAISEMENT.

(c) Upon due proof of compliance with such requirements as to notice, by advertisement or otherwise, as may be prescribed by the orphans' court by general rule or otherwise, such court may confirm such appraisement and set apart such personal or real estate, or both, to the surviving spouse, subject to claims of creditors of the decedent and to the lien of debts of the decedent.

NOTE.—This is a new clause, introduced in order to give the orphans' court express power to set apart property claimed by the surviving spouse, in advance of the distribution of the estate.

299. ALLOWANCE OUT OF REAL ESTATE VALUED AT MORE THAN \$5,000.

(d) Whenever the surviving spouse of any intestate shall claim the said five thousand dollars in value, or any part thereof, under the provisions of this act, out of real estate left by said intestate, and the real estate appraised cannot be divided so as to set apart the amount so claimed in value without prejudice to or spoiling the whole or any parcel of said real estate, and the appraisers shall appraise and value the same at any sum exceeding the amount so claimed, it shall be lawful for the orphans' court, to which such application shall be made, to confirm such appraisement, and to set apart for the use of the surviving spouse such real estate, conditioned, however, that the said surviving spouse shall pay the amount of the valuation or appraisement in excess of the amount so claimed within one year from the date of confirmation of such valuation. If the said surviving spouse shall refuse to take the real estate at such appraisement, or shall fail to make payment as above provided, the court, on application of any person interested, shall direct the executor or administrator to sell the same, and the procedure in such case shall be the same as is provided by law in cases of sales of real estate for the payment of debts of a decedent.

NOTE.—This is Section 1 of the Act of July 21, 1913, P. L. 872, 5 Purd. 6478, altered in the following particulars:

The language is changed so as to apply to cases where the real estate in question consists of more than one parcel and no single parcel is worth five thousand dollars, but all of them are worth more than that amount.

The language is also changed so as to cover cases where part of the five thousand dollars is taken in personal property and the amount claimed out of real estate is therefore less than five thousand dollars. The same change is made in subsequent clauses.

The words, "or fails to make payment as above provided," are inserted in the last sentence, also changed so as to provide that the sale shall be made by the executor or administrator, and so as to prescribe the procedure.

Under subdivision (a) as amended June 11, 1917, P. L. 755, and subdivisions (b) and (d) of Section 2 of the Intestate Act of June 7, 1917, P. L. 429, the collateral heirs cannot control in their own interest the election of a spouse to take certain property for his or her special allowance of \$5,000.

"No appeal is given from the report of the appraisers. They are the tribunal created by the act for the purpose of appraising the property the spouse elects to take under this section, and in the absence of fraud or collusion, or of such clear undervaluation of the property as may suggest fraud or collusion, their valuation should not be interfered with."

* * * * *

"The fifth exception is likewise without merit. One of the two appraisers was a second cousin of the widow. But in Vandevort's Appeal, 43 Pa. 462, two of the three appraisers were brothers-in-law of the widow, and it was held by the Supreme Court that 'the mere fact of the relationship of two out of three appraisers to the decedent or the widow is not enough to avoid their proceedings.'" Barnett, P. J., in Troutman's Est., 30 Dist. 708.

300. TITLE TO SUCH REAL ESTATE.

(e) The real estate, if taken by the surviving spouse as afore-said, shall vest in him or her and his or her heirs or assigns upon his or her paying the surplus over and above the sum of five thousand dollars or such part thereof as may be claimed out of the real estate to the parties entitled thereto. Where the real estate is sold as provided in clause (d) of this section, the sum of five thousand dollars or such part thereof as may be claimed out of the real estate shall be paid out of the purchase money to the surviving spouse, and the balance, after payment of costs and expenses, shall be distributed to the heirs, or other persons legally entitled thereto.

NOTE.—This is Section 2 of the Act of July 21, 1913, P. L. 872, 5 Purd. 6478, omitting the words, "if the real estate should not be so taken at the appraisalment," and substituting a reference to the preceding clause.

301. RENTS, INCOME, INTEREST AND DIVIDENDS OF PROPERTY SET APART.

(f) In all cases where the appraisalment of property, real or personal or both, is confirmed and the property set apart to the sur-

viving spouse under the provisions of this section, said surviving spouse shall be entitled to receive for his or her own use the net rents, income, interest and dividends thereof from the date of the death of such intestate. Where the property set apart shall consist of real estate appraised at a sum in excess of five thousand dollars or such part thereof as may be claimed out of the real estate, and the surviving spouse shall fail to pay the excess over the amount so claimed as provided in clause (d) of this section, and the property shall thereupon be sold, there shall be deducted from the sum to be paid to said surviving spouse out of the proceeds of such sale a proportionate part of the rents and income of such real estate received by such surviving spouse.

NOTE.—This is a new clause, introduced to include the right to the income of the property set apart to the surviving spouse from the date of the death of the intestate.

In the case of intestacy without issue, the surviving spouse is not entitled to interest on the special allowance of \$5,000 under Section 2 (f) of the Intestate Act of June 7, 1917, P. L. 429, in addition to the income of the property set aside or awarded to him. Fretz's Est., 28 Dist. 645.

302. REAL ESTATE IN ANOTHER COUNTY.

(g) Whenever the surviving spouse of any intestate shall claim the said five thousand dollars in value, or any part thereof, under the provisions of this section, out of real estate left by said intestate and lying in any county of this state other than the county wherein said intestate shall be domiciled at the time of his or her death, and the orphans' court having jurisdiction of the accounts of the personal representatives of said intestate shall be satisfied, upon petition filed, of the propriety of allowing such claim the court may make a decree authorizing such surviving spouse to file his or her petition in the orphans' court of the county wherein such real estate may lie, or, in a case where the real estate is divided by a county line, in the county where the mansion house may be situated, or, if there be no mansion house, in the county where the principal improvements may be, or, if there be no improvements, in either county, praying for the appointment of two appraisers.

Upon the filing of such petition, duly verified, the latter court shall appoint such appraisers, who shall be duly sworn or affirmed, and shall appraise said real estate, and shall be compensated as provided in clause (b) of this section; and proceedings shall there-

upon be had in said court and subject to its supervision and control, in the same manner and with the same effect as is provided in clauses (*c*), (*d*), (*e*) and (*f*) of this section. In every such case a certified copy of the decree confirming such appraisement, or of such decree of sale and the confirmation thereof, as the case may be, shall forthwith be filed with the clerk of the orphans' court having jurisdiction of the accounts of the personal representatives of said intestate.

The court having jurisdiction of the accounts shall in all cases have exclusive jurisdiction of the distribution of the surplus paid by such surviving spouse, or of the proceeds of such sale, after the payment of costs and expenses, as the case may be.

NOTE.—This is a new clause, introduced to cover the case of lands lying in other counties. It is modeled to some extent upon Section 32 of the Act of March 29, 1832, P. L. 190, 1 *Purd.* 1118, relating to sales for the payment of debts.

It seems clear that the distribution of the estate, and the setting apart of the real estate chosen by the surviving spouse should be made under the control of the orphans' court of the county having jurisdiction of the accounts of the administrator or executor, and it seems equally clear that some record should be made of the decree in the county where the real estate is situated, and that the sale should be under the direction of the orphans' court of that county.

303. CERTIFIED COPY OF DECREE TO BE RECORDED AND REGISTERED.

(*h*) In all cases where a decree shall be entered by any orphans' court confirming an appraisement of real estate and setting apart the same for the use of the surviving spouse, a certified copy of such decree shall be recorded in the office of the recorder of deeds of each county where such real estate shall lie, in the deed book, and shall be indexed by the recorder in the grantors' index under the name of the decedent, and in the grantees' index under the name of the surviving spouse, and shall be registered in the survey bureau, or with the proper authorities empowered to keep a register of real estate, if any there be, in said county; and the charges for recording and registering shall be the same as are provided by law for similar services, and shall be paid by said surviving spouse.

NOTE.—This is a new clause, introduced for the sake of convenience in connection with the title to real estate.

304. WIDOW'S SHARE IN LIEU OF DOWER; SHARE IN LANDS ALIENED BY HUSBAND AND IN ESTATE IN REMAINDER.

SECTION 3. The shares of the estate directed by this act to be allotted to the widow shall be in lieu and full satisfaction of her dower at common law so far as relates to lands of which the husband died seized; and her share in lands aliened by the husband in his lifetime without her joining in the conveyance shall be the same as her share in lands of which the husband died seized. The widow shall be entitled to the same share in an estate in remainder vested in interest in the husband during his lifetime, although the particular estate shall not terminate before the death of the husband.

NOTE.—This is Section 15 of the Act of April 8, 1833, P. L. 315, 2 *Purd.* 2002, altered so as to make the widow's share in lands aliened by the husband without her joinder the same as her share in lands of which he dies seized. The last sentence is added to correspond with the last sentence of Section 4 of this act.

Section 15 of the Act of 1833, was derived from Section 13 of the Act of April 19, 1794, 3 *Sm. L.* 143.

Where it was claimed by counsel for the widow that her right in the coal and mining rights, conveyed during coverture without her joinder in the deed of conveyance, is that prescribed by Section 3 of the Intestate Act of June 7, 1917, P. L. 429, to wit, not her share as prescribed by the common law, but, instead, a share 'the same as her share in lands of which her husband died seized'; this contention being followed up with the claim that because the decedent died since the Intestate Act of 1917 became operative, the widow is entitled to a one-third share of aliened lands in fee simple, and not merely a life interest in one-third of said real estate under common law or prescribed by the Intestate Act of April 8, 1833, P. L. 315. *Hughes, P. J.*, held, *inter alia*:

"As we are about to hold that this court is without jurisdiction of the subject matter involved, it will be unnecessary for us to pass upon these contentions of the petitioner's counsel. If such contentions are to be supported and upheld by the court of competent jurisdiction called to pass upon the said contentions, it will be by holding that the provisions of Section 3 of the Intestate Act of June 7, 1917, P. L. 429, are (as to lands aliened by a decedent in his lifetime) retroactive in effect, and, accordingly, applicable to such transfers of lands consummated before as well as after the said statute became operative. There is very grave doubt if such conclusions could be reached by such court in view of the doctrine supported by the Pennsylvania decisions, which uniformly held that vested rights, such as those of the respondents in the case at bar in the aliened coal and mining rights, are not to be taken away, impaired or disturbed by statutory enactments: *Taylor v. Mitchell*, 57 Pa. 209 (1868); *Barnesboro*

Borough v. Speice, 40 Pa. Superior Ct. 609 (1909). Furthermore, it may not be improper for us to suggest that the constitutionality of this provision of the said Act of June 7, 1917, P. L. 429, upon which the petitioner rests her claims, may be seriously questioned. The title of the statute indicates that it is 'An act relating to the descent and distribution of the real and personal property of persons dying intestate,' etc. The provisions of Section 3 under consideration concern lands which are aliened by the husband in his lifetime, and which, accordingly, at his death, do not form any part of his real or personal property or estate. Hence, it might be argued with effect that the failure of the title of the statute to reveal its intendment to govern real estate other than that of which decedents die seized, renders the provisions as to such aliened lands unconstitutional and inoperative.

"We leave these legal questions to be determined by a court of competent jurisdiction, whose duty it will be to decide and adjudicate the share to which the petitioner is entitled in the said aliened lands. But whether such interest in such aliened lands shall be determined by the said court to be the share fixed for her by the common law or a substitute for the common law share created by the Intestate Act of June 7, 1917, P. L. 429, such interest or share will not be 'statutory dower' nor recoverable by her as 'statutory dower' through partition proceedings. To recover her share in such aliened lands, whether it be determined to be true common law dower or the substitute therefor attempted to be created by Section 3 of the Intestate Act of June 7, 1917, P. L. 429, her remedy will be the same, to wit, by an appropriate action in the common law courts and not by partition proceedings in the orphans' court.

"We believe our conclusions will be found to be sound and supported by the decisions of the courts of Pennsylvania, if references be had to the cases." *Stockdale's Est.*, 29 Dist. 1013.

305. SURVIVING HUSBAND'S SHARE IN LIEU OF CURTESY; SHARE IN ESTATE IN REMAINDER.

SECTION 4. The shares of the estate directed by this act to be allotted to the surviving husband shall be in lieu and full satisfaction of his curtesy at common law. The surviving husband shall be entitled to the same share in an estate in remainder vested in interest in the wife during her lifetime as in property of which she dies seized, although the particular estate shall not terminate before the death of the wife.

NOTE.—This is a new section introduced in accordance with the plan to make the rights of the husband and wife the same. The last sentence is added to make the husband's rights the same as those of the wife in estates in remainder, the existing law making a distinction in this respect. See *Hitner v. Ege*, 23 Pa. 305.

306. HUSBAND'S RIGHT BARRED BY REFUSAL TO PROVIDE FOR WIFE, OR BY DESERTION.

SECTION 5. No husband who shall have, for one year or upwards previous to the death of his wife, wilfully neglected or refused to provide for his wife, or shall have, for that period or upwards, wilfully and maliciously deserted her, shall have the right to claim any title or interest in her real or personal estate after her decease, under the provisions of this act.

NOTE.—This is part of Section 5 of the Act of May 4, 1855, P. L. 430, 3 Purd. 2461, amended by the Act of May 3, 1915, P. L. 234, 6 Purd. 6588, omitting the words, "as aforesaid," before the words, "for one year or upwards."

Where the evidence adequately supported the conclusion of the court that under the particular circumstances indicated by the evidence the husband was living apart from his wife, the decedent, with her tacit consent and that he was not guilty of wilfully neglecting to provide for her within the meaning of this section of the act, it was held that he had not forfeited his interest in her estate. Phillips' Est., 271 Pa. 129.

307. WIDOW'S RIGHT BARRED BY DESERTION.

SECTION 6. No wife who shall have, for one year or upwards, previous to the death of her husband, wilfully and maliciously deserted her husband, shall have the right to claim any title or interest in his real or personal estate after his decease, under the provisions of this act.

NOTE.—This is the part added to Section 5 of the Act of 1855, by the amendment of 1915, with the substitution of the words "under this act," for "under the intestate laws of this commonwealth."

This was held to be a reenactment of the Act of May 3, 1915 (P. L. 429), in Post's Estate, 27 Dist. 748, 36 Lanc. 8, 66 P. L. J. 761, 8 Leh. 115, 33 York 11.

Under the Intestate Act of 1917, a wife, who left her husband and maintained unlawful association with another from 1908 until 1918 when her husband died, she as well as her legal representatives are barred from participating in his estate, when, from the evidence it could not be found as a fact, that she was justified in deserting him.

When, from the evidence it can be found that a wife was justified in deserting her husband, her subsequent unlawful association with another man would not bar her from sharing in his estate after his decease. Canavan's Est., 69 P. L. J. 84.

Where a husband and wife entered into an agreement in writing in which they recite that, because of "divers disputes and differences, they have consented and agreed to live separately and apart from each other

during their natural lives," and there is nothing to show that either ever released, waived or relinquished his or her rights in the estate of the other, including the right of inheritance, and they lived apart until the husband's death, the children of the husband cannot, after his death, oppose the allowance to the wife of her statutory interest in her husband's estate, under the Act of June 7, 1917, P. L. 429, on the ground of willful and malicious desertion. As the husband was content with the provisions of the agreement during his lifetime, his children cannot do what their father did not see fit to undertake while he lived. *Lawton's Est.*, 266 Pa. 558, 106 Atl. 699.

Under this section of the act where "it was agreed by everybody that the claimant was the surviving widow of the deceased testator, manifestly the burden of proof was upon those who asserted she had forfeited her right because of her wilful and malicious desertion of her husband."

Head, J., in *Schreckengost's Est.*, 77 Super. 235.

308. ISSUE.

SECTION 7. The real and personal estate of such intestate, not hereinbefore given to the surviving spouse, if any there be, shall descend to and be distributed among his or her issue, according to the following rules and order of succession, namely,—

309. CHILDREN.

(a) If such intestate shall leave children, but no other descendant, being the issue of a deceased child, the estate shall descend to and be distributed among such children.

NOTE.—This is clause 1 of Section 2 of the Act of 1833, 2 *Purd.* 1996, modified in language because of the abolition of life estates to the widow and surviving husband.

Clauses (b), (c) and (d) of Section 7 are copied from clauses 2, 3 and 4 of Section 2 of the Act of 1833.

Section 2 of the Act of 1833 was derived from Sections 3 and 4 of the Act of April 19, 1794, 3 *Sm. L.* 143.

The earlier acts provided, in substance, as follows: Act of 1683 (110th Law): "That the estate of an intestate shall go to his wife, his child, or children." Act of 1684 (172d Law): "The remainder (after the widow's share) shall go to the children, the eldest son having a double part or share." Act of 1693: "One-third to the wife, the residue among his children, and such as legally represent them (if any of them be dead) the eldest son having a double part or share," and, as to real estate, "the residue to be allotted and distributed as the surplusage of personal estate is limited and directed." Act of 1705 (3 *Sm. L.* 156 n.): "All the residue, by equal portions, to and amongst the children of such person dying intestate, allowing the eldest son two shares; and to such persons as legally represent such children, in case any of the said children be then dead * * * to whom such distribution is to be made." Section 8 of the Act of 1705 provided that "the surplusage or remaining part of the intestate's lands, tenements and hereditaments, not sold, or ordered to be sold, by

virtue of this act, and not otherwise limited by marriage settlement, shall be divided between the intestate's widow and children, or the survivors of them, who shall equally inherit and make partition, as tenants in common may or can do. * * * But if the intestate leaves no widow nor child living at the time of his death, or if the children all die in their minority, without issue, then the said lands and tenements shall descend and come to the intestate's heir at law, according to the course aforesaid. But if any of the intestate's children, dying before the intestate, shall leave lawful issue, such issue shall equally inherit the intestate's lands and tenements, with their uncles or aunts, and make partition as aforesaid." Act of March 23, 1764 (3 Sm. L. 159 n.): "If after the death of any father and mother any of their children hath died, or, at any time after the passing of this act shall die intestate, in their minority, unmarried, and without issue, but not otherwise, the lands, tenements, hereditaments and estates, real and personal, of every such intestate, shall be equally divided amongst the surviving children, and the representatives of any child or children then dead, those representatives taking only such part or share, as should have passed to the child or children they represent respectively in severalty forever. But if any child, either of age or in his or her minority, having or being entitled to any personal estate under such father, shall, after the passing of this act, die intestate, unmarried, and without issue, during the life of his or her mother, all such personal estate shall be equally divided between such mother of the deceased, and his or her brothers and sisters, and their legal representatives, in case any such brother or sister be then dead, they the said representatives only taking the share that should have passed to his, her or their parents, had he or she been living."

310. GRANDCHILDREN.

(b) If such intestate shall leave grandchildren but no child or other descendant, being the issue of a deceased grandchild, the estate shall descend to and be distributed among such grandchildren.

311. DESCENDANTS IN SAME DEGREE OF CONSANGUINITY.

(c) If such intestate shall leave descendants in other degrees of consanguinity, however remote from him, and all in the same degree of consanguinity to him, the estate shall descend to and be distributed among such descendants.

312. DESCENDANTS IN DIFFERENT DEGREES OF CONSANGUINITY.

(d) If such intestate shall leave descendants in different degrees of consanguinity to him, the more remote of them being the

issue of a deceased child, grandchild or other descendant, the estate shall descend to and be distributed among them as follows, namely,—

313. SHARES OF CHILDREN.

1. Each of the children of such intestate shall receive such share as such child would have received if all the children of the intestate who shall then be dead, leaving issue, had been living at the death of such intestate.

314. SHARES OF GRANDCHILDREN.

2. Each of the grandchildren, if there shall be no children, in like manner, shall receive such share as he or she would have received if all the other grandchildren who shall then be dead, leaving issue, had been living at the death of the intestate, and so in like manner, to the remotest degree.

315. ISSUE TAKING BY REPRESENTATION.

3. In every such case, the issue of such deceased child, grandchild or other descendant, shall take, by representation of their parents, respectively, such shares only as would have descended to such parents, if they had been living at the death of the intestate.

316. PARENTS.

SECTION 8. In default of issue as aforesaid, the real and personal estate of such intestate, not hereinbefore given to the surviving spouse, if any there be, shall go to and be vested in the father and mother of such intestate, or if either the father or mother be dead at the time of the death of the intestate, the parents surviving shall take such real and personal estate.

NOTE.—This is derived from Sections 3 and 5 of the Act of 1833, 2 *Purd.* 1997-8, altered so as to abolish the distinction between real and personal estates and give both to the parents absolutely, and modified in language because of the abolition of life estates to the widow and surviving husband.

Section 3 of the Act of 1833 was derived from Sections 5 and 7 of the Act of April 19, 1794, 3 *Sm. L.* 143. Those sections provided that where a person died without widow or lawful issue the father should take the real estate for life and the personal estate absolutely, unless such estate came to the intestate from the part of his mother, in which case such estate should descend as if the intestate had survived his father. Section 7 of the Act of 1794 provided that where an intestate left neither widow,

lawful issue nor father, but his mother survived, she should take the real and personal estate in the same way.

Section 5 of the Act of 1833 was derived from Section 6 of the Act of 1794 and Section 5 of the Act of April 4, 1797, 3 Sm. L. 296. Section 6 of the Act of 1794 provided that if the intestate left neither widow nor issue but left a father and brothers and sisters, the brothers and sisters should take the real estate after the death of the father, with provisions for representation by the issue of deceased brothers or sisters; but that if the intestate left no brothers or sisters nor their representatives, the estate should go to the father in fee simple, unless it had descended from the part of the mother.

Section 5 of the Act of 1797 provided that the estate of a woman dying intestate without leaving a husband should descend and be divided in the same manner as the Act of 1794 provided in the case of a man dying intestate. This section further provided that if any intestate died leaving neither widow, issue, father, brother, sister, or their representatives, then the estate should be vested in fee simple in the mother, unless it had descended from the part of the father.

The Act of 1683 (110th Law) provided that where an intestate left no wife, child, brother or sister or children of brothers or sisters, one-half of the estate should go to the parents and the other half to the next of kin.

The Act of 1684 (172d Law) provided that in such case one-half should go to the parents and one-half to the governor.

The Act of 1693 provided that in such case the whole estate should go to the parents.

The Act of 1705 (3 Sm. L. 156 n.) provided that in the absence of issue one-half of the estate should go to the wife and the residue "be distributed equally to every of the next kindred of the intestate, who are in equal degree, and those who legally represent them," and if there was no wife then the entire estate should be distributed to such kindred.

Where A died intestate, unmarried and without issue, leaving to survive him as next of kin and heirs-at-law his father and mother, and the father died prior to distribution of the estate, it was *held*, that under Section 8 of the Intestate Act of 1917 all the personal estate passed to decedent's mother in her own right. *Manzke's Est.*, 13 Berks 152.

The court relied on *Frankenfield v. Gruver*, 7 Barr 448: "On the death of an intestate without issue, the third section of the revised Act of 1833 gives his personal estate to his father and mother, if living, jointly and absolutely; and this, like any other joint chose in action or chattel, survives to the surviving wife. Had the husband received the assets in this instance, he would have made them his own, and his wife could have claimed them only as his administratrix; but as he died a few days after the death of his son, she is entitled in her own right." See, also, *Hamm v. Meisenhelter*, 9 Watts 349; *Gillan's Est.*, 65 Pa. 395-98.

317. COLLATERAL HEIRS.

SECTION 9. In default of issue, father and mother, the real and personal estate of such intestate, not hereinbefore given to the sur-

living spouse, if any there be, shall descend to and be distributed among the collateral heirs and kindred of such intestate, without distinction between those of the whole and those of the half blood, according to the following rules and order of succession, namely,—

The introductory clause is altered so as to abolish the distinction between the whole and the half blood in the inheritance of real estate and to make the rule as to real estate the same as that provided by clause 5 of Section 4 of the Act of 1833 in the case of personal estate. Clause 5 therefore becomes unnecessary and is omitted. The language of the introductory paragraph is further modified because of the abolition of life estates to the widow and surviving husband.

The distinction at present existing in our laws concerning the inheritance of real estate between heirs of the whole blood and those of the half blood is now admitted by all legal critics to have been unsatisfactory even in the times when it originated. Even Blackstone, Book 2, ch. 14, after stating that it is almost peculiar to the common law, and attempting to justify or rather explain it, admits that it is certainly a very fine-spun and subtle nicety. Sir Henry Sumner Maine, in his *Ancient Law*, expresses the opinion that nothing in the literature of the history of the law is more curious than Blackstone's remarks upon this rule of feudal succession. The rule had been entirely or partially abolished in very many of the United States even in Chancellor Kent's time (4 *Commentaries* 404); and has been abolished in others since he wrote. In Pennsylvania, no distinction is made by the present law between the whole and half blood in the distribution of personal property, and the present Commissioners are, as has been stated, strongly of opinion that real and personal property should descend and be distributed according to the same uniform plan.

318. BROTHERS AND SISTERS.

(a) If such intestate shall leave brothers and sisters, or either, and no nephew or niece, or child of a deceased nephew or niece, being the issue of a deceased brother or sister, the real and personal estate shall descend to and be distributed among such brothers and sisters.

NOTE.—Clauses (a) to (c) of this section are derived from clauses 1, 2 and 4 of Section 4 of the Act of 1833, 2 *Purd.* 1998.

Changes have also been made to cover the principle of representation by grandchildren of deceased brothers or sisters (see Section 11), and clause 3 of Section 4 of the Act of 1833 is replaced by the present clause (d); but no change is intended in the existing law as stated in *Krout's Appeal*, 60 Pa. 380.

Section 4 of the Act of 1833 was derived from Sections 6 and 8 of the Act of 1794, and Sections 5 and 7 of the Act of 1797.

Section 6 of the Act of 1794 provided that real estate should, after the death of the father, descend to brothers and sisters, with provision for representation by the issue of deceased brothers or sisters, the principle

of representation not being limited to the children of brothers and sisters. Section 8 of the Act of 1794 contained similar provisions for the case where the mother of the intestate took a life estate.

Section 11 of the Act of 1794 provided for inheritance by the half blood in the absence of parents or brothers or sisters of the whole blood or their issue, but with a limitation to those of the blood of the first purchaser.

Section 5 of the Act of 1797 provided for the inheritance by brothers and sisters in the absence of widow, issue or parents, with provision for representation by the issue of deceased brothers or sisters. Section 7 of that act provided for inheritance of the real estate by brothers and sisters of the whole blood to the exclusion of those of the half blood, but permitted the half blood to share equally in the personal estate, and provided for the inheritance of both real and personal property by brothers and sisters of the half blood in the absence of those of the whole blood or their issue, with a limitation to those of the blood of the first purchaser.

The Act of 1683 (110th Law) provided for inheritance by brothers and sisters or the children of brothers or sisters in the absence of wife or child. No distinction was made as to the half blood.

The Act of 1684 (172d Law) was similar.

The Act of 1705 (3 Sm. L. 156 n.) provided that in the absence of issue the widow should take half the estate and the residue should go equally "to every of the next kindred of the intestate, who are in equal degree, and those who legally represent them: *Provided*, That there be no representatives admitted amongst collaterals, after brothers and sisters children." In case there was neither widow nor child, then the next kindred took the whole estate in the same manner.

319. NEPHEWS AND NIECES.

(b) If such intestate shall leave neither brother nor sister, and no child of any deceased nephew or niece, being the issue of a deceased brother or sister, but nephews or nieces, being the children of such deceased brother or sister, the real and personal estate shall descend to and be distributed among such nephews and nieces.

320. CHILDREN OF DECEASED BROTHERS OR SISTERS TAKING BY REPRESENTATION.

(c) If such intestate shall leave neither brother nor sister, nor any nephew or niece, being the child of such deceased brother or sister, but children of deceased nephews or nieces, the real and personal estate shall descend to and be distributed among such children of deceased nephews or nieces.

321. DESCENDANTS OF BROTHERS AND SISTERS.

(d) If such intestate shall leave brothers or sisters and nephews or nieces, being children of a deceased brother or sister, and chil-

dren of deceased nephews or nieces, being issue of deceased brothers and sisters, or shall leave members of any two of these three classes, the real and personal estate shall descend to and be distributed among such brothers and sisters, nephews and nieces, and children of deceased nephews and nieces, as follows, namely:

Each brother and sister shall receive such share as he or she would have received if all the brothers and sisters who died before the intestate leaving children or children of deceased children surviving the intestate had been living at the death of the intestate.

Each nephew and niece, if the intestate shall leave any brother or sister, shall receive an equal portion of the share which his or her parent would have taken if then living, which portion shall be what he or she would have taken if all the children of his or her parent who died before the intestate leaving children surviving the intestate had been living at the death of the intestate; but if such intestate shall leave neither brother nor sister, the nephews and nieces shall take per capita.

Each child of a deceased nephew or niece, whether the intestate shall leave members of one or both of the other classes, shall receive an equal portion of the share which his or her parent would have received if living at the death of the intestate.

Sec Wightman's Est., 49 Pa. C. C. 614, 30 Dist. 885, 68 P. L. J. 833.

322. NEXT OF KIN.

SECTION 10. In default of all persons hereinbefore described, the real and personal estate of the intestate shall descend to and be distributed among the grandparents or descendants of deceased grandparents of such intestate, and in default thereof to and among the next of kin to such intestate.

NOTE.—This is Section 7 of the Act of 1833, 2 Purd. 1999, which was derived from Section 12 of the Act of 1794. The latter section, however, provided for representation by the issue of kindred without limitation.

The explanatory words at the end, declaratory of the existing law, have been added for completeness.

The Acts of 1683, 1684, 1693 and 1705 provided for inheritance by the next of kin, the Act of 1705 limiting the principle of representation, as already stated, to brothers' and sisters' children.

This and Sections 11 and 12 make no change in the existing law, inasmuch as no suggestions have come to the Commissioners for their modification, and none seem desirable.

See Wightman's Est., 49 Pa. C. C. 614, 30 Dist. 885, 68 P. L. J. 833.

When an intestate's only next of kin are uncles and aunts, they take per capita and not per stirpes under the Intestate Act of June 7, 1917, P. L. 429; and if an uncle or aunt be deceased, leaving children, such children take only by representation the share their parent would have taken if living.

Gest, J., held: "The exceptant relied upon Sections 10 and 12 of the Intestate Act of June 7, 1917, P. L. 429, 437, which, it appears from the report of the Commissioners to Codify and Revise the Law of Decedents' Estates, were derived from the preëxisting law. The stirpetal distribution, however, which is provided thereby applies only in case the decedent is survived by one or more than one grandparent, and not when, as in this case, all the grandparents predeceased the intestate. When the next of kin of the intestate are all uncles and aunts, they take equally and per capita, as clearly appears from Section 19 of the act; and if an uncle or aunt be deceased, leaving children, such children take only by representation the share their parent would have taken if living, as is provided by Section 11." Brodie's Est., 30 Dist. 654.

Where the only heirs living and able to take are first and second cousins, the former take to the exclusion of the latter. In so holding, Moschzisker, C. J., said, *inter alia*:

"The question here presented involves the right of appellants, who are second cousins, to share with first cousins in the distribution of the estate of an intestate, there being no nearer kindred.

"The Act of June 7, 1917, P. L. 429, designates the persons who are entitled to the real and personal estate of an intestate after the payment of all just debts and legal charges. The first eight sections of the statute determine the distributive shares of the spouse, issue, father and mother; and, in absence of these, the ninth section provides for a division among certain collateral heirs and kindred.

"In the present case, as previously indicated, there is a complete default of all those on whom the right of distribution is bestowed by the first nine sections of the act, but there are living three first cousins, children of two deceased aunts, and two second cousins, who are grandchildren of another deceased aunt, all of whom are descendants of one of the deceased grandparents of the intestate.

"Appellants contend that the inheritance falls to the first and second cousins together, each one of whom is entitled to share 'per capita,' as a member of a 'new class of collateral heirs,' under Section 10 of the Act before us for construction, which provides that, 'in default of all persons hereinbefore described, the real and personal estate of the intestate shall descend to and be distributed among the grandparents or descendants of deceased grandparents of such intestate, and, in default thereof, to and among the next of kin to such intestate.'

"The section just quoted is vague and indefinite; it fails either to say or suggest what possible groups of the persons indicated are to inherit, how these groups are to be arrived at, and whether those composing them take, as individuals, per stirpes or per capita. The section is evidently intended as a general one, which does not attempt to mark out the respective rights of the parties included in it. To construe this part of the act so as to bring about the results contended for by appellants would

lead to such radical departures from the historical development of our intestate law, and the system of representation there built up, that one is immediately led to investigate the subsequent provisions of the statute, in order to find the real meaning of the part in controversy; and, fortunately, when this is done, light is seen. Before entering upon a consideration of these other sections, however, it may be well first to trace briefly the progress of legislation, for much the better part of a century past, bearing on the question we have to solve. (Here follows a review of prior legislation). * * * * *

"With the law in the condition indicated, the Intestate Act of 1917 was passed.

"While Section 10 of this late act provides that, in default of other and nearer kin, the estate of an intestate shall descend to 'grandparents or descendants of deceased grandparents,' it is evident from the other parts of the act that this is intended in a general sense and as merely introductory to subsequent, more specific provisions, particularly Section 12. which continues the existing rule laid down in the Act of 1887, *supra*, that, when a living grandparent is nearest of kin to an intestate and, at the time of the latter's death, there are also alive descendants of a deceased grandparent, these descendants represent the latter and share the estate of the intestate with the surviving grandparent, in the manner specifically provided.

"When Sections 10 and 12 are read together, we see that it never was intended by the former to change the established policy of our law and set up unlimited representation among collaterals generally (this conclusion is reinforced by a consideration of certain other sections, which we shall presently take up; nor was it specifically intended that, with first cousins of an intestate alive, second cousins should inherit as representing their parents, or otherwise,—which parents, we may remark, would be first cousins, to the intestate, in the same class with other first cousins, and, if alive, entitled to inherit with them,—but if we take the words as they stand in Section 10, without reference to other parts of the act, and give them controlling significance, as appellants would have us do, this construction, carried to its logical conclusion, would mean that both first and second cousins should take at the same time, and, since the language there employed does not say the estate shall go to such of the descendants of deceased grandparents as may be nearest of kin to the intestate, but simply—without limitation—that it shall go to 'descendants of deceased grandparents,' this might, in many cases, lead to children, in effect, representing their living parents, which, of course, is contrary to the per stirpes rule: Shoch Estate No. 2, 271 Pa. 165. Parts of the act subsequent to Section 10, however, forbid any such distribution as contended for by appellants; and thus we see that the section in question cannot have the meaning they would give to it.

"While Section 12, already referred to, extends somewhat the principle of representation among collaterals taking thereunder, yet the provisions of that section apply only where 'one or more than one grandparent' is alive and entitled to take at the death of the intestate; and the extended representation there provided for is confined to 'children or other descendants of any deceased grandparent,' when, and only when, they share

the estate involved with a surviving grandparent. Section 10 merely introduces the idea, in a general way, of who, in default of the nearer kindred provided for in the earlier sections, may inherit; it does not undertake to specify under what conditions the surviving grandparents or the descendants of dead grandparents, respectively, shall take, or in what proportions; that is left to Section 12, which fully covers the ground. * * *

"We agree with the court below that 'a clear view of the legislative intent is found by linking together the tenth, eleventh and nineteenth Sections of the act (and considering the twelfth). It then appears that, when there is a lapse of all of those in succession to the intestate provided for in the other sections, the descendants of deceased grandparents inherit, * * * (but when there are) cousins *german* * * * (being) in the same degree of consanguinity, they take the whole of the estate in equal shares; and this view of the legislative intent precludes a distribution to the second cousins.' In short, when there is no living grandparent, and first cousins of the intestate survive him, second cousins also surviving, are not the next of kin (nearest blood relations), nor can they take by representation; hence they do not take at all. * * *" Opinion of January 3, 1922 in *Miles' Est.*, S. C. October Term, 1921, Nos. 61 and 62, not yet reported. 272 Pa. 329.

323. LIMITS OF REPRESENTATION.

SECTION 11. The grandchildren of brothers and sisters and the children of uncles and aunts shall be entitled to take by representation the shares of real and personal estate which their parents would have taken if living; but, except as hereinafter provided, there shall be no representations admitted collaterals after the grandchildren of brothers and sisters and the children of uncles and aunts.

NOTE.—This takes the place of Section 8 of the Act of 1833, 2 Purd. 1999, and Section 2 of the Act of April 27, 1855, P. L. 368, 2 Purd. 1999, with the addition, in the last line, of the words "grandchildren of brothers and sisters and the."

The Commissioners who drafted the Act of 1833 remarked that in Section 8 they restored to the law a provision which was included in the Act of 1705 and continued in force until the Act of 1794, from which it was omitted, probably through inadvertence. See notes to Sections 9 and 10.

Section 2 of the Act of 1855 extended the principle of representation so as to include the grandchildren of deceased brothers and sisters and the children of deceased uncles and aunts. There seems to be no reason for altering the law as it now stands.

When an intestate's only next of kin are uncles and aunts, they take per capita and not per stirpes under the Intestate Act of June 7, 1917, P. L. 429; and if an uncle or aunt be deceased, leaving children, such children take only by representation the share their parent would have taken if living.

GEST, J., held:

"The exceptant relied upon Sections 10 and 12 of the Intestate Act of June 7, 1917, P. L. 429, 437, which, it appears from the report of the Commissioners to Codify and Revise the Law of Decedents' Estates, were derived from the preëxisting law. The stirpetal distribution, however, which is provided thereby applies only in case the decedent is survived by one or more than one grandparent, and not when, as in this case, all the grandparents predeceased the intestate. Where the next of kin to the intestate are all uncles and aunts, they take equally and per capita, as clearly appears from Section 19 of the act; and if an uncle or aunt be deceased, leaving children, such children take only by representation the share their parent would have taken if living, as is provided by Section 11. We are, therefore, of opinion that the auditing judge was correct in the distribution which was made in the adjudication." Brodie's Est., 30 Dist. 654.

Where decedent died intestate, unmarried, without issue and leaving him to survive neither father, mother, brothers, sisters, nephews or nieces, and his nearest collateral relatives were first cousins, the children of deceased uncles and aunts; and distribution was made to the eight first cousins in equal shares, Miller, P. J., held, in dismissing exceptions:

"This section (Sec. 11, *supra*) is a restatement of Section 8 of the Intestate Act of 1833 and of Section 2 of the Act of April 27, 1855. These two acts were construed as constituting an additional class of collateral heirs and fixed the right of inheritance by representation (Hays' Appeal, 89 Pa. 256), but under the Act of June 30, 1885, P. L. 251, this construction could no longer be followed. This act provides, Section 1, 'that whenever by the intestate laws of this Commonwealth it is directed that the real and personal estate shall descend to, and be distributed among several persons, whether lineal or collateral heirs or kindred standing in the same degree of consanguinity to the intestate, if there shall be only one of such degree he shall take the whole of such estate, and if there shall be more than one they shall take in equal shares, and if real estate they shall hold the same as tenants in common.'.....

"It is clear that the reenactment of Section 19, with the interpretation put upon the Act of '85 as amending the Act of '55, shown in the cases cited, provides that this distribution must be per capita among the eight first cousins, they being all of the same class and in the same degree of consanguinity from the intestate. The opposition to this view is that, when the Legislature in 1917 reenacted on the same day and at the same time Section 11 and Section 18 and thus seemed to put the provisions of Section 11 back to the place it occupied prior to the Act of '55, and the decisions thereunder in Cremer's Estate, 156 Pa. 49, this restored the rule in Hay's Appeal, 89 Pa. 256, and that distribution in the case at bar must be by representation.

"The question may well be raised touching the language of Section 11, which reenacted the old provisions already referred to; it puts the grandchildren of brothers and sisters and the children of uncles and aunts into a class who shall be entitled to take by representation. In this connection it must be observed that Section 10 of the Intestate Act of 1917 provides 'that in default of all persons hereinbefore described the

real and personal estate of the intestate shall descend to and be distributed among the grandparents or descendants of deceased grandparents.' It seems to be manifest from the language of this section that grandchildren of brothers and sisters are provided for in Section 9 of the same act and would take exclusive of the children of uncles and aunts, and that, therefore, the suggestion made that Section 11 applies only where grandchildren of brothers and sisters and children of deceased brothers and sisters, or uncles and aunts and children of deceased uncles and aunts, survive the intestate, is not manifest, since that would read into the section language not found there.

"To hold that Section 11 reenacts the law as construed under Hays' Appeal repealing the effect of Section 19, which, as stated in Cremer's Estate, harmonizes the entire intestate system when the parties entitled to take are in the same degree of consanguinity, cannot have been the intent of the legislature, but that the intent was not to change the law, as construed by the later decisions of the appellate courts in passing on the Acts of 1855 and 1885." Wightman's Est., 49 Pa. C. C. 614, 30 Dist. 885, 68 P. L. J. 833.

In discussing the rights of the second cousins as against first cousins as affected by this section of the act, Moschzisker, C. J., said *inter alia*,—

"Section 11 reenacts the rule provided in earlier legislation, that, 'the grandchildren of brothers and sisters and the children of uncles and aunts shall be entitled to take by representation the shares * * * * which their parents would have taken if living;' but it expressly states that, 'except as hereinafter provided, there shall be no (other) representation admitted among collaterals;' the words 'as hereinafter provided' evidently having application to the representation among descendants of a dead grandparent referred to in Section 12, and before discussed.

"The part of the act now under discussion, Section 11, apparently deals with the phase of the principle of representation which determines who are entitled to take, and not with its other phase,—how division shall be made among those so entitled; the latter aspect of the matter seems to be provided for by Section 19. * * * *

"The provision (of Section 19) that lineal or collateral heirs standing in the same degree of consanguinity to the intestate shall take in equal shares, when read with the provision in Section 11, that 'there shall be no representation admitted among collaterals after the grandchildren of brothers and sisters and children of uncles and aunts,' shows plainly that the tenth section, depended on by appellants, cannot be given the effect of setting up unlimited representation among collaterals; nor can it be construed to set up a new class of collateral heirs, who, although of different degrees, all being 'descendants of deceased grandparents of the intestate,' would take equally the estate of the latter, as contended by these second cousins,—such a scheme of distribution is so unusual in our law as to require plain and unequivocal language to establish it (Whitaker's Estate, 175 Pa. 139, 143), which we do not find here. * * *" Opinion of January 3, 1922, in Miles' Est., S. C. October Term, 1921, Nos. 61 and 62 not yet reported.

324. GRANDPARENTS AND ISSUE OF DECEASED GRANDPARENTS.

SECTION 12. If the next of kin of an intestate, entitled to take under the provisions of this act, shall be one or more than one grandparent of such intestate, and there shall be living, at the time of the decease of such intestate, children or other descendants of any deceased grandparent, then the children or other descendants of any such deceased grandparent shall represent the grandparent so deceased, and shall take the share of real or personal estate to which such deceased grandparent would be entitled if living.

The issue of any such deceased grandparent shall take according to the following rules of succession, namely,—

When an intestate's only next of kin are uncles and aunts, they take per capita and not per stirpes under the Intestate Act of June 7, 1917, P. L. 429; and if an uncle or aunt be deceased, leaving children, such children take only by representation the share their parent would have taken if living.

GEST, J., held:

"The exceptant relied upon Sections 10 and 12 of the Intestate Act of June 7, 1917, P. L. 429, 437, which, it appears from the report of the Commissioners to Codify and Revise the Law of Decedents' Estates, were derived from the preëxisting law. The stirpetal distribution, however, which is provided thereby applies only in case the decedent is survived by one or more than one grandparent, and not when, as in this case, all the grandparents predeceased the intestate. Where the next of kin of the intestate are all uncles and aunts, they take equally and per capita, as clearly appears from Section 19 of the act; and if an uncle or aunt be deceased, leaving children, such children take only by representation the share their parent would have taken if living, as is provided by Section 11. Brodie's Est., 30 Dist. 654.

See opinion of Moschzisker, C. J., January 3, 1922, in Miles' Est., S. C. October Term 1921, Nos. 61 and 62 not yet reported.

325. CHILDREN OF DECEASED GRANDPARENT.

(a) If there be only children of such deceased grandparent, the share of such deceased grandparent shall descend to and be distributed among such children.

NOTE.—The clauses of this section are copied from clauses 1 to iv of Section 1 of the Act of May 25, 1887, P. L. 261, 2 Purd. 1999.

It is stated in Whitaker's Estate, 175 Pa. 139, 142, that the Act of 1887 was passed to meet the decision in McDowell v. Addams, 45 Pa. 430, where it was held that a living grandparent took to the exclusion of the descendants of a deceased one.

326. GRANDCHILDREN OF DECEASED GRANDPARENTS.

(b) If there be grandchildren of such deceased grandparent and no other descendants, being children of a deceased grandchild, and no child, the share of such deceased grandparent shall descend to and be distributed among such grandchildren.

The only change made from the Act of 1887 is to add, in clause (b), the words "being children of a deceased grandchild" after "no other descendants." This is the evident meaning of the clause, and the words are inserted for the sake of clearness.

327. DESCENDANTS OF DECEASED GRANDPARENT IN SAME DEGREE OF CONSANGUINITY.

(c) If there be descendants of such deceased grandparent in any other degree however remote from him, and all in the same degree of consanguinity to him, the share of such deceased grandparent shall descend to and be distributed among such descendants.

328. DESCENDANTS OF DECEASED GRANDPARENT IN DIFFERENT DEGREES OF CONSANGUINITY.

(d) If there be descendants of such deceased grandparent in different degrees of consanguinity to him, the more remote of them being the issue of a deceased child, grandchild or other descendant, the share of such deceased grandparent shall descend to and be distributed among them as follows, namely,—

329. CHILDREN OF DECEASED GRANDPARENT.

1. Each of the children of such deceased grandparent shall receive such share as such child would have received if all the children of such deceased grandparent, who shall then be dead leaving issue, had been living at the death of the intestate.

330. GRANDCHILDREN OF DECEASED GRANDPARENT.

2. Each of the grandchildren, if there shall be no children of such deceased grandparent, in like manner shall receive such share as he or she would have received if all the other grandchildren, who shall then be dead, leaving issue, had been living at the death of the intestate, and so in like manner to the remotest degree.

331. ISSUE TAKING BY REPRESENTATION.

3. In every such case, the issue of such deceased child, grandchild or other descendant of such deceased grandparent shall take, by representation of their parents respectively, such share only as would have descended to such parents, if they had been living at the death of the intestate.

NOTE.—This provision of the Act of 1887 introduced the principle of unlimited representation, not in harmony with the Act of 1855 (Section 324 *supra*); but it has been in effect for thirty years and so far as the Commissioners are advised, has proved satisfactory. Hence, they do not feel justified in recommending a change.

332. RULE AS TO BLOOD OF FIRST TAKER ABROGATED.

SECTION 13. In all cases where, under the provisions of this act, the real estate shall descend to and the personal estate shall be distributed among the next of kin of an intestate, the real as well as the personal estate shall pass to and be enjoyed by such next of kin, without regard to the ancestor or other relation from whom such estate may have come, it being the true intent and meaning of this act that the rule excluding from the inheritance of real estate persons not of the blood of the ancestor or other relation from whom such real estate descended, or by whom it was given or devised to the intestate, be abrogated, and that the heir at common law shall not take, in any case, to the exclusion of other heirs and kindred standing in the same degree of consanguinity with him to the intestate.

NOTE.—This is Section 11 of the Act of 1833, 2 Purd. 2002, amended so as to apply to all cases and not merely to cases “not expressly provided for” by the act. It involves the repeal of Section 9 of the Act of 1833, 2 Purd. 2000-1, and of Section 2 of the Act of May 25, 1887, P. L. 261, 2 Purd. 2000, which reenacted the provisions of Section 9 of the Act of 1833 in connection with the cases provided for by the Act of 1887, as to which see the last preceding note.

The Act of 1794, as already noted, expressly imposed the rule as to the blood of the first purchaser in certain cases, namely, those of inheritance by the father or mother or by the half blood; and the common law rule seems to have been applied generally before the Act of 1833 (see *Bevan v. Taylor*, 7 S. & R. 397; overruling *Walker v. Smith*, 3 Yeates 480). There is no reference to the rule in any of the earlier acts.

The common law rule as to inheritance from the blood of the first purchaser was infringed upon by the Act of 1833, but still exists in other cases where its effect is generally entirely arbitrary; and the Commissioners recommend its total abolition. This change is also in accordance

with the general principle of this revision, that no distinction should be made in the intestate act between real and personal estates.

See *Miller v. Brown*, 49 Pa. C. C. 332.

333. FOREGOING PROVISIONS APPLY ONLY TO LEGITIMATES.

SECTION 14. Except as otherwise provided in Section 15, the foregoing provisions of this act relative to descent and distribution of real and personal estate among the heirs and next of kin of intestates shall be construed to mean such persons only as may have been born in lawful wedlock.

NOTE.—This is Section 17 of the Act of 1833, 2 *Purd.* 2003, except for the insertion of the words from “except” to “foregoing,” and the substitution of “next of kin” for “descendants and collateral relations.” The rights of illegitimates are treated in the next section; the sections after Section 15 apply to illegitimates as well as legitimates.

The Act of 1794 and the earlier acts contain no reference to illegitimates, but mention “children” and “lawful issue.”

334. ILLEGITIMATES,—INHERITANCE AS BETWEEN MOTHER, GRANDPARENTS AND CHILD.

SECTION 15 (a) The mother of an illegitimate child, her heirs and next of kin, the maternal grandfather and grandmother of said illegitimate child, and said illegitimate child, its heirs and next of kin, shall have capacity to take or inherit from each other personal estate as next of kin, and real estate as heirs, under the foregoing provisions of this act, in the same manner and to the same extent as if said child or children had been born in lawful wedlock.

NOTE.—This is Section 2 of the Act of July 10, 1901, P. L. 639, 2 *Purd.* 2005-6, changing “legal representatives” to “next of kin” in two places, substituting “the foregoing provisions of this act” for “the intestate laws of this Commonwealth,” omitting, in lines 3 and 4, the words “or children” before “its,” and “or their” after “its,” and in line 6, “in fee simple, or otherwise,” after “heirs,” and adding “grandfather.”

The Act of April 27, 1855, P. L. 368, Section 3, gave an illegitimate child and its mother capacity to inherit from one another.

The Act of June 5, 1883, P. L. 88, Section 1, gave illegitimate children of the same mother capacity to inherit personal property from one another.

Section 3 of the Act of April 27, 1855, *supra*, was amended by the Act of June 14, 1897, P. L. 142, Section 1, 2 *Purd.* 2004-5, so as to enable illegitimate children and their issue and their mother and grandmother to take or inherit from each other personal and real estate, and as regards

real or personal estate so taken and inherited, to transmit the same according to the intestate laws of the state.

The "grandmother" included in the Act of 1897, is presumably, the maternal grandmother, although the act does not say so.

The Act of June 10, 1901, P. L. 551, Section 1, 2 Purd. 2005, provides that all children of the same mother, whether legitimate or illegitimate dying without leaving children or others entitled to inherit under the existing laws, shall have capacity to inherit from each other, to the exclusion of the grandmother of said illegitimate child or children. This is covered by clause (b) of the present section of the new act.

The new draft does not include the provision of Section 1 of the Act of 1897, and of Section 1 of the Act of July 10, 1901, that "illegitimate children shall take and be known by the name of their mother," and the further provisions of the latter section are also omitted as not within the scope of an intestate act.

This will be covered by repealing Section 1 of the Act of 1897 but allowing Section 1 of the Act of July 10, 1901, 2 Purd. 2005, to stand, although the other sections of that act should be repealed since their substance is contained in the new act.

"In this and other states the rigors of the common law rule have been mitigated by statutes, increasing the rights of illegitimates, especially in reference to inheritance from and through their mothers. Section 15 of the 'Intestate Act' of June 7, 1917, P. L. 439, which is a substitute for former legislation, contains a summary of the present statutory law on this subject in Pennsylvania." Wanner, P. J. in *Commonwealth v. Gross*, 35 York 93.

335. INHERITANCE AS BETWEEN CHILDREN, LEGITIMATE AND ILLEGITIMATE.

(b) Every illegitimate child shall be considered as a brother or sister to every other child of its mother, legitimate or illegitimate.

NOTE.—This is Section 3 of the Act of July 10, 1901, 2 Purd. 2006, altered by changing "each" to "every," inserting the words "a brother or sister," omitting the words "of the half blood," since the distinction between the whole and half blood is abolished by the new act, and omitting the remainder of the section, beginning "notwithstanding any repute or conviction." Neither the meaning nor the purpose of that part of the section is apparent.

336. LEGITIMATION AS TO MOTHER, BUT NOT AS TO FATHER.

(c) The intent of this section is to legitimate an illegitimate child only so far as is provided by clauses (a) and (b) hereof.

This section is not intended to change the existing law with regard to the father of such a child, and his heirs and next of kin.

NOTE.—This is Section 4 of the Act of July 10, 1901, as amended by Section 1 of the Act of March 26, 1903, P. L. 70, 2 Purd. 2006, altered by omitting after "illegitimate child" the words, "or its heirs, as to its mother and her heirs," and inserting "only so far as is provided in clauses (a) and (b) of this section;" by substituting "and his" for "or their respective," and "next of kin" for "legal representatives," and by omitting the proviso making the act applicable to pending cases, as not being in harmony with the general policy of the present act, namely, that it shall apply only to the estates of persons dying on or after a certain day, subsequent to the approval of the act.

337. LEGITIMATION BY MARRIAGE OF PARENTS.

(d) In any and every case where the father and mother of an illegitimate child or children shall enter into the bonds of lawful wedlock, or shall heretofore have entered into the bonds of lawful wedlock, such child or children shall be legitimated for all purposes of inheritance by, from or through such child or children, under the provisions of this act, as if he or they had been born during the wedlock of his or their parents.

NOTE.—This is founded on Section 1 of the Act of May 14, 1857, P. L. 507, 3 Purd. 2445, modified so as to be limited to the purposes of the intestate law, so as to omit the requirement of cohabitation, and so as to extend that section to include inheritance, from or through such legitimated children. The provision that the act shall apply to past cases is in accord with the Act of April 21, 1858, P. L. 413, Section 1, 3 Purd. 2446, which provided that the Act of 1857 should be taken to apply to all cases within its terms prior to its date as well as those subsequent thereto.

The Commissioners recommend the omission of the requirement of cohabitation, as contained in the present law. As this has been construed by the courts: Clauer's Appeal, 11 W. N. C. 427; Agnew's Estate, 29 W. N. C. 520, the cohabitation need be only nominal; in cases of "forced" marriages, real cohabitation is rarely possible and sometimes very inadvisable.

338. ADOPTED CHILDREN,—INHERITANCE AS BETWEEN ADOPTED PERSONS AND ADOPTING PARENT.

SECTION 16. (a) Any minor or adult person adopted according to law and the adopting parent or parents shall, respectively, inherit and take by devolution from and through each other personal estate as next of kin and real estate as heirs, under the

provisions of this act, as fully as if the person adopted had been born a lawful child of the adopting parent or parents.

NOTE.—This is founded on Section 1 of the Act of April 13, 1887, P. L. 53, 2 Purd. 2006, and upon the provisions as to inheritance contained in the various acts relating to adoption.

This and the other clause of the present section are intended to cover the entire subject of inheritance by and from adopted persons and seem to make it necessary to repeal the existing adoption acts, so far only, however, as they relate to inheritance.

The Act of May 9, 1889, P. L. 168, Section 1, 1 Purd. 280-281, relating to adoption of adults, provides that the adopted person shall inherit only as one of the children of the adopting parent, and that such adopted child and the lawful children of the adopting parent shall inherit from and through each other as if all had been lawful children of the same parents.

Section 1 of the Act of April 22, 1905, P. L. 297, 5 Purd. 5227, amending Section 1 of the Act of May 19, 1887, P. L. 125, 1 Purd. 279, which amended Section 7 of the Act of May 4, 1855, P. L. 431, contains the same provision.

Section 3 of the Act of June 1, 1911, P. L. 539, 5 Purd. 5228, relating to adoption of adults, provides that the adopted person and the adopting parent shall inherit and take from and through each other as fully as if the person adopted had been born the lawful child of the adopting parent. Section 4 of the same act provides that the adopted person and other children of the adopting parent, whether natural or adopted, shall inherit from and through each other. This act repeals the Act of 1889 above cited.

The Act of May 28, 1915, P. L. 580, 5 Purd. 5228, further amends Section 7 of the Act of May 4, 1855, above cited, by adding the provision that the adopting parent and the adopted child shall inherit and take from and through each other as fully as if the person adopted had been born a lawful child of the adopting parent.

See Moore's Est., 30 Dist. 152; 68 P. L. J. 670; 15 Del. 367.

339. INHERITANCE AS BETWEEN ADOPTED PERSON AND ADOPTED RELATIVES; NATURAL KIN OF ADOPTED PERSON EXCLUDED.

(b) The person adopted shall, for all purposes of inheritance and taking by devolution, be a member of the family of the adopting parent or parents. The adoptive relatives of the person adopted shall be entitled to inherit and take from and through such person to the exclusion of his or her natural parents, grandparents and collateral relatives, but the surviving spouse of such adopted person and the children and descendants of such adopted person shall have all his, her and their respective rights under this act. Adopted persons shall not be entitled to inherit or take

from or through their natural parents, grandparents or collateral relatives, but each adopted person shall have all his or her rights under this act in the estates of his or her spouse, children and descendants.

NOTE.—This is founded on Section 4 of the Act of June 1, 1911, P. L. 539, 5 Purd. 5229, with an extension of its provisions so as to make the adopted person for all purposes of inheritance a member of the family of the adopting parent.

This seems to be in accordance with the policy indicated by Section 1 of the Act of April 13, 1887, P. L. 53, 2 Purd. 2006, which provides that "the adopting parents and their lawful heir and kindred shall be treated and shall inherit from such adopted child, according to the intestate laws of this commonwealth, the same as though such adopted child were the natural child and heir-at-law of such adopting parents, to the exclusion of the natural parents, kindred and heirs-at-law of such adopted child, reserving to the husband and wife of such adopted child all his or her respective rights, under the intestate laws; * * * *Provided, however,* That this act shall only apply to such property as the adopted child shall have inherited or derived from the adopting parents or their kindred."

The proviso is omitted in accordance with what appears to be the legislative policy in later statutes.

See Moore's Est., 30 Dist. 152; 68 P. L. J. 670; 15 Del. 367.

340. SURVIVING SPOUSE AND NO KNOWN HEIRS OR KINDRED,—RIGHTS OF SURVIVING SPOUSE.

SECTION 17. (a) In default of known heirs or kindred, competent as aforesaid, the real estate of such intestate shall be vested in the surviving spouse of such intestate, if any, and the surviving spouse shall be entitled to the whole of the personal estate.

NOTE.—This is Section 10 of the Act of 1833, 2 Purd. 2001, substituting "surviving spouse" for "widow or surviving husband," and omitting the description of the estate, which is superfluous in view of Section 18 of the new act.

Section 10 of the Act of 1833 was copied from the Act of January 21, 1819, P. L. 25 (7 Sm. L. 142.)

Neither the Act of April 19, 1794, 3 Sm. L. 143, nor the Act of April 4, 1797, 3 Sm. L. 296, contained any provision on this subject, nor did any such provision appear prior to the Act of 1819.

341. PROCEDURE.

(b) If any person shall die, or has died intestate, leaving a surviving spouse and no known heirs or kindred, such surviving spouse, his or her heirs or legal representatives, may, at any time

after the expiration of one year from the death of such intestate, and after final settlement of the administration accounts of such intestate, present a petition to the orphans' court of the county wherein any real estate of such intestate may lie, or, in the case of personal estate, to the orphans' court having jurisdiction of said administration accounts, setting forth that the said intestate died leaving no known heirs or kindred and seized or possessed of real or personal estate, which by virtue of this act, vested in such surviving spouse. Such petition shall be verified by the oath or affirmation of the party petitioning, or of some other person knowing the facts.

Upon the presentation of said petition, the said court shall grant a citation to all the heirs or other persons interested or claiming any interest in said estate, to appear in said court at some time certain and show cause why a decree should not be made, ordering and directing, in the case of real estate, that the title thereto be adjudged to be in such surviving spouse, his or her heirs, or, in the case of personal estate, that the administrator or administrators of the estate of said intestate shall pay over to such surviving spouse, his or her legal representatives, the balance of such intestate's estate in his or their hands. Notice of such citation shall be published for such length of time and in such manner as the court in its discretion shall think proper.

If, upon the return of the citation and due proof of publication thereof, agreeably to the order of the court, no heirs or kindred claiming said estate shall appear, nor any good cause be shown to the contrary, the court shall order and decree as aforesaid, and, in the case of real estate, a certified copy of such decree shall be recorded in the office of the recorder of deeds of the county where said real estate shall lie, in the deed book, and shall be indexed by the recorder in the grantors' index under the name of the decedent, and in the grantees' index under the name of the surviving spouse, and shall be registered in the survey bureau, or with the proper authorities empowered to keep a register of real estate, if any there be, in said county. The charges for recording and registering shall be the same as are provided by law for similar services. The record of such decree shall be deemed and held to be *prima facie* proof of the facts therein set forth with like force and effect as the record of a deed; and if, upon the return of any such citation, any person or persons shall appear in court claiming to be heirs or kindred of

such intestate, whose rights to the said estate shall be disputed by such surviving spouse, his or her heirs or legal representatives, then the court may direct an issue to determine the matter, or may make such order therein as they shall think proper.

In all cases the decree of such court entered upon the failure of any heirs or kindred to appear, or after the trial of such an issue, or otherwise, shall not be subject to be reopened by said court after the expiration of six months from the date of its entry, except as hereinafter provided. Any such cause may be removed by appeal to the supreme court or superior court, in the same manner as appeals are now taken by law in cases determined in the orphans' court or tried by jury upon issues directed by that court. Where the record in such cause is thus removed to an appellate court, the six months' period within which the decree is subject to be reopened by the orphans' court shall cease to run until the return of the record from the appellate court.

NOTE.—This is Section 1 of the Act of April 6, 1833, P. L. 207, 2 Purd. 2001-2, modified so as to include the procedure in cases of real estate in the same or other counties and by adding provisions for recording and as to the conclusiveness of the decree.

The provision as to recording is copied from the Act of June 20, 1883, P. L. 131, 2 Purd. 2004, providing a procedure whereby any person taking lands under the intestate laws may show on the records of the orphans' court and the recorder of deeds his interest in such lands. The Commissioners recommend the repeal of the Act of 1883 as unnecessary or ineffective.

The Act of April 6, 1833, does not seem to have been drafted by the Commissioners to Revise the Civil Code, and no previous act containing similar provisions has been found.

342. ESTATES PASSING TO PERSONS ENTITLED UNDER THE ACT.

SECTION 18. The real estate of such intestate shall be vested in the person or persons entitled thereto under the provisions of this act for such estate as the intestate had therein, and such person or persons shall be entitled to the personal estate absolutely.

NOTE.—This is a new section, introduced in order to avoid the necessity of repeating the description of the estates to be taken under the various preceding sections.

By the provisions of the Intestate Act of 1917, joint owners, in fee, as tenants in common of real estate may have partition in equity of the

estate so held, upon the death of one cotenant. *Maurer v. Straub*, 16 Sch. 174.

See *Wightman's Est.*, 49 Pa. C. C. 614, 30 Dist. 885, 68 P. L. J. 833.

343. PERSONS IN THE SAME DEGREE OF CONSANGUINITY TAKE EQUALLY.

SECTION 19. Wherever real or personal estate shall descend to or be distributed among several persons, whether lineal or collateral heirs or kindred, standing in the same degree of consanguinity to the intestate, if there shall be only one of such degree, he shall take the whole of such estate, and if there shall be more than one, they shall take in equal shares, and if real estate, shall hold the same as tenants in common.

NOTE.—This is Section 14 of the Act of 1833, 2 *Purd.* 2002, omitting after "wherever," the words "by the provisions of this act, it is directed." Section 1 of the Act of June 30, 1885, P. L. 251, 2 *Purd.* 2002, making the same provision, was passed in consequence of the decision in *Hayes' Appeal*, 89 Pa. 256, that the children of deceased uncles and aunts, taking by representation under Section 2 of the Act of April 27, 1855, P. L. 368, 2 *Purd.* 1999, were not within the scope of Section 14 of the Act of 1833, and took per stirpes and not per capita, although no uncles or aunts survived.

Since Section 2 of the Act of 1855 is embodied in Section 11 of the new act (see 323 *supra*) the provisions of the new Section 19 clearly include first cousins.

There seems to have been no similar provision in the acts previous to 1833.

Where decedent died intestate leaving as next of kin first cousins, it was not error to distribute the estate in equal shares as this is clearly the intent of the Intestate Act of 1917, which reenacts prior statutes providing for distribution where the beneficiaries are of the same degree of consanguinity. *Wightman's Est.*, 49 Pa. C. C. 614; 30 Dist. 885, 68 P. L. J. 833 (see 323 *supra*).

When an intestate's only next of kin are uncles and aunts, they take per capita and not per stirpes under the Intestate Act of June 7, 1917, P. L. 429; and if an uncle or aunt be deceased, leaving children, such children take only by representation the share their parent would have taken if living.

GEST, J., held:

"The exceptant relied upon Sections 10 and 12 of the Intestate Act of June 7, 1917, P. L. 429, 437, which, it appears from the report of the Commissioners to Codify and Revise the Law of Decedents' Estates, were derived from the preëxisting law. The stirpetal distribution, however, which is provided thereby applies only in case the decedent is survived by one or more than one grandparent, and not when, as in this case,

all the grandparents predeceased the intestate. Where the next of kin of the intestate are all uncles and aunts, they take equally and per capita, as clearly appears from Section 19 of the act; and if an uncle or aunt be deceased, leaving children, such children take only by representation the share their parent would have taken if living, as is provided by Section 11. *Brodie's Est.*, 30 Dist. 654.

See opinion of Moschzisker, C. J., January 3, 1922, in *Miles' Est.*, S. C. October Term, 1921, Nos. 61 and 62, not yet reported.

344. POSTHUMOUS CHILDREN.

SECTION 20. Descendants and relatives of an intestate, begotten before the death of the intestate and born thereafter, shall in all cases inherit and take in like manner as if they had been born in the lifetime of such intestate.

NOTE.—This is Section 13 of the Act of 1833, 2 Purd. 2002, which was founded on Section 10 of the Act of April 19, 1794, 3 Sm. L. 143. That section provided: "That all posthumous children shall, in all cases whatsoever, inherit in like manner, as if they were born in the lifetime of their respective fathers."

345. LIMITATION OF CLAIMS.

SECTION 21. All relatives and persons concerned in the estate of any intestate who shall not lay legal claim to their respective shares of the personal estate within seven years of the decease of the intestate, shall be debarred from the same forever: *Provided*, That if any such relative or person shall, at the time of the decease of the intestate, be within the age of twenty-one years, he or she shall be entitled to receive and recover the same, if he or she shall lay legal claim thereto within seven years after coming to full age.

NOTE.—This is Section 19 of the Act of 1833, 2 Purd. 2003, with the insertion of the words "of the personal estate" in accordance with the decisions cited in the note to Purdon, and the omission of the saving as to married women.

Section 19 of the Act of 1833 was founded on Section 18 of the Act of April 19, 1794, 3 Sm. L. 143, the revisers omitting the saving of persons *non compos mentis*, in prison or out of the United States.

The Act of 1684 (172nd Law) imposed a limitation of three years. The Act of 1693 (3 Sm. L. 154 n.) provided the same limitation. The Act of 1700 (3 Sm. L. 155 n.) made the limitation seven years. Section 5 of the Act of 1705 (3 Sm. L. 157 n.) read: "That all such of the intestate's relations, and persons concerned, who shall not lay legal claim to their respective shares, within seven years after the decease of the intestate, shall be debarred from the same forever."

346. ADVANCEMENTS.

SECTION 22. If any person, other than a surviving spouse, entitled under the provisions of this act to inherit or take real or personal property from such intestate, shall have any estate by settlement of such intestate, or shall have been advanced by him in his lifetime, either in real or personal estate, the amount of such settlement or advancement shall be charged against the share of the person who shall have received it, so that the total amount received by him, including the amount of such settlement or advancement, shall not exceed the amount received by each of the other persons who are equally entitled under the provisions of this act to inherit or take from said intestate.

NOTE.—This is founded on Section 16 of the Act of 1833, 2 *Purd.* 2002, which contained in substance the provisions of Section 9 of the Act of April 19, 1794, 3 *Sm. L.* 143, the changes now made being for the purpose of including all persons entitled under the act and simplifying the language.

Section 2 of the Act of 1705 (3 *Sm. L.* 156 n.) contained a provision similar to that of the Act of 1794.

The Act of March 13, 1815, P. L. 173 (6 *Sm. L.* 298), provided for the appointment of three auditors to settle the amount of advancements where some of the heirs resided out of the state, and for the procedure by the auditors. It is stated in a note in *Pepper and Lewis' Digest of Laws* that this act was supplied by Section 20 of the Act of March 29, 1832, P. L. 190. The Act of 1815 does not appear in *Stew. Purd.* It is now recommended for repeal.

347. PERSON ADJUDGED GUILTY OF MURDER NOT TO INHERIT FROM MURDERED PERSON.

SECTION 23. No person who shall be finally adjudged guilty, either as principal or accessory, of murder of the first or second degree, shall be entitled to inherit or take any part of the real or personal estate of the person killed, as surviving spouse, heir or next of kin to such person under the provisions of this act.

NOTE.—This is a new section framed to meet the situation presented in *Carpenter's Estate*, 170 *Pa.* 203. In that case, a son killed his father, was convicted of murder and was executed therefor. His mother, the widow of the intestate, was convicted as an accessory after the fact and duly sentenced. The motive of the crime was to get possession of the estate of the decedent, and the supreme court was constrained to hold that the criminals had not forfeited their rights under the intestate law.

This decision, although criticized on equitable grounds: 36 *American Law Register N. S.* 225; 64 *University of Pennsylvania Law Review* 307, is nevertheless in accordance with the weight of authority: see *In Re*

Houghton (1915) 2 Ch. 173; 15 Columbia Law Review 260, 275; but it appears shocking to morality that an heir should be permitted to profit by his crime.

The Commissioners in their draft of the Wills Act herewith submitted (see 244 *supra*) have embodied a similar provision applicable to the case of a devisee or legatee, in order that the same rule may apply. The Commissioners are of opinion however that the guilt of the party charged with the crime should be determined by his conviction in the proper forum.

348. ESCHEAT.

SECTION 24. In default of all such known heirs or kindred, or surviving spouse, competent to take as aforesaid, the real and personal estate of such intestate shall go to and be vested in the commonwealth by escheat.

NOTE.—This is Section 12 of the Act of 1833, 2 Purd. 2002, with the addition of the words, “competent to take.”

The section was introduced in the Act of 1833 for the purpose of completing the system, and was taken from the Act of September 29, 1787, 2 Sm. L. 425.

349. ACT NOT TO APPLY TO PERSONAL ESTATE OF INTESTATE DYING DOMICILED OUTSIDE THE COMMONWEALTH.

SECTION 25. Nothing in this act contained, relative to a distribution of personal estate among kindred, shall be construed to extend to the personal estate of an intestate whose domicile, at the time of his death, was out of this commonwealth.

NOTE.—This is Section 20 of the Act of 1833, 2 Purd. 2004, which was new in the Act of 1833.

In the distribution of assets of foreign intestates, the Orphans' Court of Allegheny County will require that the domicile of the decedent be conclusively established before a decree will be made. If the distributees are domiciled abroad, their rights to share in the estate must be clear as well as how said shares are to be disbursed either by consular agencies or otherwise.

MILLER, P. J., held:

“We now indicate, as suggestions, certain general principles, the same to be lodged with the clerk for the benefit of and aid to accountants and counsel.

“These are as follows:

“First, that the domicile of the decedent must be ascertained and found as a fact before the question of distribution can be considered; to find this fact, residence and intent must concur and must be made to appear in each case.

"Second, that the grant of letters by the register is not conclusive evidence of domicile.

"Third, that domicile having been established, distribution will be made in accordance with the laws thereof; if domiciled in Pennsylvania, then according to the laws of this state; if domiciled abroad:

"(a) To the parties entitled, either as personal representatives or directly upon adjudications in the foreign domicile so showing, the same to be fully authenticated, including proof of the law governing the same.

"(b) That when distribution cannot be made to the parties entitled thereto under the law of the foreign domicile as set forth in paragraph (a) above, then distribution may be made to the duly accredited consular agent of the foreign domicile, upon proof of credentials filed; the balance so awarded to him on his acceptance as consular representative to be held and transmitted, under general treaties, conventions, consular rights or international law, as duly recognized and as existing between the United States and the country of the decedent's domicile.

"Fourth, that powers of attorney by claimants, whether as personal representatives or as direct heirs, in the decedent's foreign domicile, cannot be recognized unless they are accompanied by proof of a foreign adjudication in the domicile of the decedent of the laws governing the same and of his right thereto.

"Fifth, that no suggestion here covers the question argued to a great extent of the right of consuls or consular agents to be granted letters of administration, since no such question actually arises in any of the class of estates submitted.

"Sixth, that in the absence of proof of foreign domicile or of the rights of parties to take, or failure to ascertain who they are, with failure to present the adjudication and proofs of the laws herein set forth, and on the failure or refusal of consular representatives to accept residues of balances for transmission, where no other disposition is made, distribution must be suspended pending further proceedings." *Estates of Foreign Intestates*, 68 P. L. J. 1.

350. SHORT TITLE.

SECTION 26. This act shall be known and may be cited as the Intestate Act of 1917.

351. WHEN ACT SHALL GO INTO OPERATION.

SECTION 27. This act shall take effect on the thirty-first day of December, 1917, and shall apply to the estates, real and personal, of all persons dying intestate on or after said day. As to the estates, real and personal, of all persons dying before that day, the existing laws shall remain in full force and effect.

The orphans' court possesses no jurisdictional authority to appoint appraisers to appraise and set aside estate property claimed as and for a \$5,000.00 allotment for the surviving spouse of an intestate dying before

December 31, 1917; the power of the said Court being limited and confined to appointing substitute appraisers to take the place of estate appraisers appointed by the personal representative of the estate but who are unable to act. *Hilton's Estate*, 1 Wash. 125.

352. REPEALER.

SECTION 28. This Act of Assembly is intended as an entire and complete system for the descent and distribution of the estates, real and personal, of persons dying intestate. The following acts and parts of acts of assembly are hereby repealed as respectively indicated, but so far only as relates to the estates, real and personal, of any person or persons dying intestate on or after the thirty-first day of December, 1917. The repeal of the first section of an act shall not repeal the enacting clause.

Sections 3 to 13 inclusive and 18 of an act entitled "An Act directing the descent of intestates' real estates, and distribution of their personal estates, and for other purposes therein mentioned," passed April 19, 1794, 3 Sm. L. 143, absolutely.

Sections 5, 6 and 7 of an act entitled "An Act supplementary to the act, entitled 'An Act directing the descent of intestates' real estates, and distribution of their personal estates, and for other purposes therein mentioned,'" passed April 4, 1797, 3 Sm. L. 296, absolutely.

An act entitled "An Act for the settlement of the estates of intestates, where some of the heirs reside out of the state," approved March 13, 1815, P. L. 173.

An act entitled "An Act relative to escheated estates," approved January 21, 1819, P. L. 25, absolutely.

An act entitled "A supplement to an act entitled 'An Act relative to escheated estates,' passed the twenty-first of January, eighteen hundred and nineteen," approved April 6, 1833, P. L. 207, absolutely.

An act entitled "An Act relating to the descent and distribution of the estates of intestates," approved April 8, 1833, P. L. 315, absolutely.

Section 9 of an act entitled, "A supplement to an act, entitled 'An Act relative to the LeRaysville Phalanx,' passed March, Anno Domini one thousand eight hundred and forty-seven, and relative to obligors and obligees, to secure the right of married women, in relation to defalcation, and to extend the boundaries of the borough of Ligonier," approved April 11, 1848, P. L. 536, in so far as it relates to the distribution of the personal es-

tate of a deceased married woman, and section 10 of said act, absolutely.

Section 2 of an act entitled "An Act to amend certain defects of the law for the more just and safe transmission and secure enjoyment of real and personal estate," approved April 27, 1855, P. L. 368, absolutely, and section 3 of said act in so far as it relates to inheritance.

Section 5 and the proviso to Section 7 of an act entitled "An Act relating to certain duties and rights of husband and wife, and parents and children," approved May 4, 1855, P. L. 430, absolutely.

An act entitled "An Act to legitimate children born out of lawful wedlock," approved May 14, 1857, P. L. 507, in so far as it relates to inheritance.

An act entitled "An Act permitting illegitimates to inherit from each other in certain cases," approved June 5, 1883, P. L. 88, absolutely.

An act entitled "An Act to facilitate the proof and record of the title of real estate vested in the heirs of certain intestates," approved June 20, 1883, P. L. 131, absolutely.

An act entitled "An Act providing for the manner in which estates of intestates shall be distributed, where the distributees stand in the same degree of consanguinity to the intestate," approved June 30, 1885, P. L. 251, absolutely.

An act entitled "An Act relating to the mode of inheriting from, through, or by, a child or children adopted according to law, and being a supplement to an act, entitled 'An Act relating to certain duties of husband and wife, and parents and children,' approved the fourth day of May, one thousand eight hundred and fifty-five," approved April 13, 1887, P. L. 53, absolutely.

The proviso to Section 1 of an act entitled "An Act amending section seventh of an act, entitled 'An act relating to certain duties and rights of husband and wife, and parents and children,' approved the fourth day of May, Anno Domini one thousand eight hundred and fifty-five, providing that married men or women, in case of drunkenness or profligacy of husbands or wives, may consent to the adoption of their children," approved May 19, 1887, P. L. 125, absolutely.

An act entitled "An Act relating to estates of intestates, providing that children and descendants of deceased grandparents shall represent such deceased grandparents whenever grand-

parents are entitled as next of kin to intestates,” approved May 25, 1887, P. L. 261, absolutely.

The first proviso of Section 1 of an act entitled “An Act relating to the adoption of any person as an heir,” approved May 9, 1889, P. L. 168, absolutely.

An act entitled “An Act to amend the third section of the act, entitled ‘An Act to amend certain defects of the law for the more just and safe transmission and secure enjoyment of real and personal estate,’ approved the twenty-seventh day of April, Anno Domini one thousand eight hundred and fifty-five, providing that illegitimate children shall take their mother’s name, and she and her mother, and they and their issue, shall be capable to take or inherit from each other,” approved June 14, 1897, P. L. 142, in so far as it relates to inheritance.

An act entitled “An Act to allow legitimate and illegitimate children, born from the same mother, dying without children, to inherit real and personal property from each other, in exclusion to the grandmother of the illegitimate child or children, as though they had been born in lawful wedlock,” approved June 10, 1901, P. L. 551, absolutely.

Sections 2, 3 and 4 of an act entitled “An Act to regulate and define the legal relations of an illegitimate child, or children, its or their heirs, with each other and the mother and her heirs,” approved July 10, 1901, P. L. 639, absolutely.

An act entitled “An Act to amend an act, entitled ‘An Act to regulate and define the legal relations of an illegitimate child or children, its or their heirs with each other and the mother and her heirs, approved the tenth day of July, Anno Domini one thousand nine hundred and one; and applying and extending it to all cases, now pending, where the estate of such illegitimate or mother has not been actually paid to and received by collateral heirs or the Commonwealth,” approved March 26, 1903, P. L. 70, absolutely.

The proviso to Section 1 of an act entitled “An Act to amend an act, entitled ‘An act amending section seventh of an act, entitled “An Act relating to certain duties and rights of husband and wife and parents and children,” approved the fourth day of May, Anno Domini one thousand eight hundred and fifty-five, providing that married men or women, in case of drunkenness or profligacy of husbands or wives, may consent to the adoption of their children,” approved April 22, 1905, P. L. 297, absolutely.

An act entitled "An Act to amend section one of an act, entitled 'An Act relating to the descent and distribution of the estates of intestates,' passed and approved April eighth, one thousand eight hundred and thirty-three, defining and declaring the interest that shall descend to and vest in the surviving husband or wife of such intestate," approved April 1, 1909, P. L. 87, absolutely.¹

Sections 3 and 4 of an act entitled "An Act relating to the adoption of adult persons as heirs," approved June 1, 1911, P. L. 539, in so far as they relate to inheritance and devolution under the intestate laws.

An act entitled "A supplement to an act, entitled 'An Act to amend section one of an act, entitled "An Act relating to the descent and distribution of the estates of intestates," passed and approved April eighth, one thousand eight hundred and thirty-three, defining and declaring the interest that shall descend to and vest in the surviving husband or wife of such intestate,' approved April first, Anno Domini one thousand nine hundred and nine," approved July 21, 1913, P. L. 872, absolutely.

An act entitled "An Act amending article two of section one of an act, entitled 'An Act relating to the descent and distribution of the estates of intestates,' approved the eighth day of April, one thousand eight hundred thirty-three, as amended, by further regulating the appointment and number of appraisers," approved July 21, 1913, P. L. 875, absolutely.¹

An act entitled "An Act to amend an act, approved the fourth day of May, one thousand eight hundred and fifty-five, entitled 'An Act relating to certain duties and rights of husband and wife and parents and children,'" approved May 3, 1915, P. L. 234, absolutely.

An act entitled "An Act amending section one of an act, entitled 'An Act amending section seven of an act, entitled "An act relating to certain duties and rights of husband and wife, and parents and children," approved the fourth day of May, Anno Domini one thousand eight hundred and fifty-five; providing that married men or women, in case of drunkenness or profligacy of husbands or wives, may consent to the adoption of their children,' approved the nineteenth day of May, Anno Domini one thousand eight hundred and eighty-seven," approved May 28, 1915, P. L. 580, in so far as it relates to inheritance and devolution under the intestate laws.

All other acts of assembly, or parts thereof, that are in any way in conflict or inconsistent with this Act or any part thereof, are hereby repealed, so far as relates to the estates, real and personal, of any person or persons dying intestate on or after the thirty-first day of December, 1917.

¹See Hilton's Est. 1 Wash. 125, wherein the Court held:

"In Section 28, this language appears:

"The following acts and parts of acts of assembly are hereby repealed as respectively indicated,—but so far only as relate to the estates, real and personal, of any person or persons dying intestate on or after the 31st of December, 1917."

"Later on in said Section 28, the Acts of April 1, 1909, P. L. 87 and July 21, 1913, P. L. 875, are cited for repeal under the said conditions specified earlier in said section. It is thus seen that by its very terms the Intestate Act of 1917, P. L. 429, is to apply to estates of those only who died on or after December 31, 1917; and that, conversely, the said statute is not to apply to the estates of those who died prior to that date (in which last category falls the estate of Wallace J. Hilton under consideration). As to the Hilton Estate, therefore, the said Intestate Act of 1917, P. L. 429, expressly says that the laws as they existed prior to December 31, 1917, shall remain and apply in full force and effect.

"We have hereinbefore reached the conclusion that the Wallace J. Hilton Estate is to be controlled and governed, so far as the \$5,000.00 allotment is concerned, by the said Act of July 21, 1913, P. L. 875, which, as to estates of all persons dying prior to December 31, 1917, remains expressly unrepealed by the Intestate Act of 1917, P. L. 429. Certainly, had the Legislature intended that the procedure relative to spouses' allotments prescribed by the Intestate Act of 1917, P. L. 429, should apply to and govern as well, estates of persons dying before December 31, 1917, they would have had the language of the Act so state and they would not have employed the quoted language of Sections 27 and 28."

THE FIDUCIARIES ACT

of

June 6, 1917, (P. L. 447)

PRELIMINARY NOTE BY COMMISSION.

In this voluminous Act, the Commissioners have endeavored to arrange in one connected and systematic statute the law relating to the administration and distribution of the estates of decedents and of minors, and of trust estates, and particularly the jurisdiction, powers and procedure of the orphans' court relative to fiduciaries.

The intricacy of the subject is greater than anyone will readily believe who has not taken the trouble to examine it himself; and the labors of the Commissioners have been principally directed to the revision and consolidation of existing statutes and the repeal of those that have become obsolete, rather than to the introduction of novel legislation. The changes recommended are for the most part designed to simplify and harmonize the procedure, which, in many instances, has become complicated by the passage of numerous statutes relating to specific matters of detail.

In Section 6, the Commissioners have revised the law relative to the estates of persons presumed to be dead on account of absence for seven years or more from their last domicile, a subject that has become very complicated by the numerous statutes which have been adopted in the past thirty years, and stands in great need of revision.

In Section 11, a method of compelling the filing of an inventory has been provided, and the fees of appraisers of decedents' estates have been regulated.

In Section 12, the widow's and children's exemption has been increased from \$300 to \$500, and the whole procedure regulated.

In Section 14, the rents of real estate accruing after the death of the owner have been made assets for the payment of his debts, when the personal estate is insufficient, and the procedure has been regulated.

In Section 15, the lien of decedents' debts has been shortened from two years to one year unless continued by proper proceedings, and the law as to judgments against decedents and their representatives has been revised.

Section 16 contains the statute law relative to sales and mortgages of real estate for the payment of debts. Very little change is made, but the phraseology has been altered and the provisions of the law rearranged in more symmetrical order. Sales for payment of debts are now governed by several Acts of Assembly, some of the provisions of which are obsolete or inappropriate to present conditions. The procedure is regulated and the law as to confirmation of sales and the discharge of liens is particularly provided for.

In Section 18, the procedure in cases of contracts of decedents for the sale or purchase of real estate is more clearly regulated.

In Section 21, the law on the subject of interest on legacies is defined, particularly in reference to interest on legacies bequeathed in trust.

In Section 22, the Commissioners recommend a general rule upon the subject or apportionment of all periodical payments directed by will.

In Section 23, a change is recommended where there is a bequest of personal property or the proceeds of real estate for life and the life tenant does not enter security, in consequence of which a trustee is appointed. Such trustee, according to the revised act, undertakes only the usual responsibility of a trustee and is not to be considered as an insurer of the fund.

In Section 24, the jurisdiction of the orphans' court for the collection or enforcement of all legacies is made exclusive.

In Section 31, the power of testamentary trustees and guardians to lease real estate is extended and regulated.

In Section 32, elections by fiduciaries in behalf of their wards or cestuis que trust are provided for.

In Section 40, the orphans' court is empowered to authorize fiduciaries to settle or compromise litigation or disputes.

In Section 41, the power of fiduciaries to invest trust funds is extended.

In Section 42, more extensive powers are given to fiduciaries to incorporate or join in the incorporation of their decedent's business.

In Section 46 and other sections, the term for the settlement of a decedent's estate is shortened to six months instead of one year from the date of the grant of letters testamentary or of administration; and in the same section power is expressly given to the orphans' court to have examined the assets of estates in the hands of fiduciaries. The Commissioners have also provided for express notice of the filing of accounts to be given to all persons who claim to be interested.

In this section the law is made more specific as to the place where trustees' accounts should be filed; and the jurisdiction over testamentary trustees is made exclusive in the orphans' court.

In Section 49, more specific provisions are made as to distribution of estates.

In Section 53, the law as to the removal of fiduciaries is codified and revised, and summary power is given to the court in cases that seem to require it.

In Section 58, the powers of foreign fiduciaries are revised.

In Section 59, the law on the subject of the appointment of guardians is recast and codified.

In Section 60, the law on the subject of trustees *durante absentia* is revised in connection with the law as to the estates of presumed decedents.

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353. TITLE.**AN ACT**

Relating to the administration and distribution of the estates of decedents and of minors, and of trust estates; including the appointment, bonds, rights, powers, duties, liabilities, accounts, discharge and removal of executors, administrators, guardians and trustees, herein designated as fiduciaries; the administration and distribution of the estates of presumed decedents; widow's and children's exemptions; debts of decedents, rents of real estate as assets for payment thereof, the lien thereof, judgments and executions therefor, sales and mortgages of real estate for the payment thereof, and the discharge of real estate from the lien thereof; contracts of decedents for the sale or purchase of real estate; legacies, including legacies charged on land; the discharge of residuary estates and of real estate from the lien of legacies and other charges; the appraisal of real estate devised at a valuation; the ascertainment of the curtilage of dwelling houses or other buildings devised; the abatement and survival of actions and the substitution of executors and administrators therein, and suits against fiduciaries; investments by fiduciaries; the organization of corporations to carry on the business of decedents; the audit and review of accounts of fiduciaries; refunding bonds; transcripts to the court of common pleas of balances due by fiduciaries; the rights, powers and liabilities of non-resident and foreign fiduciaries; the appointment, bonds, rights, powers, duties and liabilities of trustees *durante absentia*; the recording and registration of decrees, reports and other proceedings, and the fees therefor; appeals in certain cases; and also generally dealing with the jurisdiction, powers and procedure of the orphans' court in all matters relating to fiduciaries concerned with the estates of decedents.

The Fiduciaries Act became effective on the first moment of the day on which it purports to have been signed by the Governor, June 7, 1917. Huber's Est., 27 Dist. 25.

354. DEFINITION OF "FIDUCIARY."

SECTION I. Be it enacted by the Senate and House of Representatives of the Commonwealth of Pennsylvania in General Assembly met, and it is hereby enacted by the authority of the

same, That as used in this act, the term "fiduciary" shall include executors, administrators, guardians and trustees, whether domiciliary or ancillary, subject to the jurisdiction of the orphans' court of any county of this commonwealth.

NOTE.—This is suggested by Section 1 of the Act of May 3, 1915, P. L. 218, 6 Purd. 7038, which relates only to the reduction of bonds. It is inserted in the new act in order to avoid repeating in many places the words "executors, administrators, guardians and trustees."

355. GRANTING OF LETTERS TESTAMENTARY AND OF ADMINISTRATION—JURISDICTION OF REGISTER.

SECTION 2. (a) Letters testamentary and of administration shall be grantable only by the register of wills of the county within which was the family or principal residence of the decedent, at the time of his decease; and if the decedent had no such residence in this commonwealth, then ancillary letters testamentary or of administration shall be grantable only by the register of the county where the principal part of the goods and estate of such decedent within this commonwealth shall be.

NOTE.—This is derived from the first part of Section 6 of the Act of March 15, 1832, P. L. 135, 1 Purd. 1074, which was new in that act.

The language as to a decedent having no residence in the commonwealth has been modified so as to show that it refers to the granting of ancillary letters. See *Sayre's Exrs. v. Helme's Exrs.*, 61 Pa. 299.

The provision that "letters testamentary and of administration shall be grantable only by the register of wills of the county within which was the family or principal residence of the decedent at the time of his decease," refers to residence, not domicile. Therefore, his "family or principal residence," in any conflict between two counties as to the jurisdiction of the register of wills, must mean the place where he actually resides with his family; and this is purely a question of fact.

In dismissing exceptions the Court, per GERT, J., held:—

"The argument of the learned counsel for the exceptant is based on the theory that the decedent's *domicile* was in Philadelphia, and that the respondent failed to show that the decedent intended to remain in Montgomery County; but this is aside from the real question. The act clearly refers to *residence*, not *domicile*; it says, 'the family or principal residence.' A man can have but one domicile, though he may have any number of residences, therefore, his 'family or principal residence,' in this conflict between two counties as to the jurisdiction of the register of wills, must mean the place where he actually resides with his family, and this was undoubtedly in Glenside. It may be admitted that in some of the decisions the words *residence* and *domicile* are used as synonymous, but

strictly, in cases of administration, succession, etc., the law of domicile applies when questions arise as to the application of the law of different states, or of this State and that of a foreign country. Such was the case in *Barclay's Estate*, 259 Pa. 401, relied on by the exceptant, and *Lowry's Estate*, 6 Pa. Superior Ct. 143. And as domicile depends not only upon the actual residence of the person, but upon his intention of retaining it as his home, or of changing it, great weight is properly attached to his declaration of intention, or to the facts from which such intention may be reasonably inferred; *Dacey on Domicile*, chap. II; *Guier v. O'Daniel*, 1 Binn. 349; *Bumpus's Estate*, 23 Dist. R. 654. Some of the distinctions that may exist between domicile and residence are considered in *Taney's Estate*, 97 Pa. 74, and *Raymond v. Leishman*, 243 Pa. 64, and though many perplexing questions may arise from these distinctions, this is not one of them."

Blessing's Est., 29 Dist. 3, 68 P. L. 78; 15 Del. 224, affirmed in 267 Pa. 380.

356. LETTERS NOT TO BE GRANTED AFTER TWENTY-ONE YEARS EXCEPT ON ORDER OF COURT.

(b) No letters testamentary or of administration shall in any case be originally granted upon the estate of any decedent, after the expiration of twenty-one years from the day of his decease, except on the order of the orphans' court, upon due cause shown.

NOTE.—This is Section 21 of the Act of 1832, 1 Purd. 1075, which corresponded to the latter part of Section 20 of the Commissioners' Draft. The first part of that section of the draft provided that letters should not issue until the expiration of five days after the death.

The twenty-one year provision was new in the Act of 1832. The Commissioners remarked that it did not apply to cases where an administration commenced had become vacant. In *Hanbest's Estate*, 21 Pa. Super Ct. 427, however, it is held that the word "originally" in the second line of the section is synonymous with "in the first instance," and that the section applies not only to cases in which no letters of administration have been previously granted, but also to cases in which prior letters have been issued.

The words "testamentary or" have been inserted, and "orphans' court" substituted for "register's court."

See form 74.

357. WHO ENTITLED TO LETTERS OF ADMINIS- TRATION.

(c) Whenever letters of administration are by law necessary, the register having jurisdiction shall grant them in such form as the case shall require, to the widow, if any, of the decedent, or to such of his relations or kindred as by law may be entitled

to the residue of his personal estate, or to a share or shares therein, after payment of his debts; or he may join with the widow in the administration, such relations or kindred, or such one or more of them, as he shall judge will best administer the estate, preferring always, of those so entitled, such as are in the nearest degree of consanguinity with the decedent, and also preferring males to females; and in case of the refusal or incompetency of every such person, to one or more of the principal creditors of the decedent applying therefor, or to any fit person at his discretion.¹ *Provided*, That if such decedent was a married woman, her husband shall be entitled to the administration, in preference to all other persons: *And provided further*, That in all cases of an administration with a will annexed, where there is a general residue of the estate bequeathed, the right to administer shall belong to those having the right to such residue, and the administration in such case shall be granted, by the register, to such one or more of them as he shall judge will best administer the estate.²

NOTE.—This is Section 22 of the Act of March 15, 1832, P. L. 135, 1 Purd. 1080, corresponding to Section 21 of the Commissioners' Draft. It was intended as an arrangement and condensation of the material provisions of the Statute of 21 Henry VIII, c. 5, with the addition of a proviso, derived from Section 5 of the Act of March 21, 1772, 1 Sm. L. 389, giving the husband the right to administer, and a clause giving residuary legatees the right to letters with the will annexed.

See form 39.

¹Where the register of wills granted letters of administration to a person not a relative, heir, legatee, creditor, nor a resident of the county in which the decedent lived, the letters will be revoked.

A register of wills may under the Act of June 7, 1917, P. L. 447, Section 2, clause (c), in the absence of kin or creditor, grant letters of administration "to any fit person, at his discretion," but his action does not depend on the literal interpretation of clause (c); his discretion must be legal, founded on good reason, and not a wilful or arbitrary exercise of power. *Boyko's Est.*, 49 Pa. C. C. 495; 21 Lack. Jur. 161.

The Act of June 7, 1917, P. L. 447, cannot be construed as permitting a minor to administer an estate and there is nothing in the act to indicate that a minor has any right of election.

When no persons qualified to act apply for administration on the estate of a decedent, the register must exercise his judgment in the selection of a fit person.

The official counsel of a register of wills is not disqualified to act as administrator of an estate, by appointment of the register for whom he is counsel.

The Court, per HENRY, P. J., specially presiding, held:

"It is very evident that only those relatives or next of kin who may be entitled to the residue of the personal estate of the decedent are the ones who are entitled to administration or to elect an administrator. This provision of the Act of Assembly could not possibly be construed as permitting a minor or a *non compos mentis* to administer an estate and there is nothing in the Act to indicate that a minor has any right of election. In the absence of persons qualified to act applying for administration, the Register must exercise his own good judgment in the selection of some fit person.....

"While it is true that the Register of Wills could not act as administrator, yet, under the Act of Assembly this is incident to his office and could not be construed as extending to his counsel or business or official associates. Possibly there would be greater reason why an executive officer of a corporation should not act as administrator where that corporation is the guardian of the minor inheriting the estate." *Hanshaw's Est.*, 22 Dauphin 178 (1919).

²This provision does not apply where the testator asks "the Court to appoint the executors." *Shontz's Est.* 71 Super. 295.

See *Sharpless' Est.*, 28 Dist. 746; 15 Del. 16; 20 Luz. 161.

358. PETITION FOR LETTERS.

(d) Every application to any register of wills for the issuance of letters testamentary or of administration shall be in the form of a petition, duly verified by affidavit, setting forth the residence and citizenship and the place, day and hour of death of the decedent, the estimated value of his property, real and personal, the location of his real property, and, in the case of an intestacy, the names and residences of the surviving spouse, if any, and of the next of kin of the intestate, together with an averment that the persons named are the surviving spouse and all the next of kin of the intestate. *In the case of applications for letters testamentary, such applications shall set forth whether the testator has married and whether any children have been born to such testator since the execution of the will offered for probate.*³

NOTE.—This is a new clause, drafted in accordance with the existing practice in Philadelphia and Allegheny Counties and perhaps in others. As the practice is understood not to be uniform throughout the State, the Commissioners have considered it proper to recommend it as a general law. The provision as to the statement of citizenship of the decedent has been

added to cover cases of alien decedents, where questions as to notice to consuls, etc., may arise.

This clause supplies Sections 1 and 2 of the Act of May 15, 1874, P. L. 194, 1 Purd. 1075, which provide that all persons applying for letters shall file an affidavit as to the day and hour of the death, which shall be filed by the register. Those sections are therefore recommended for repeal.

³As amended by Act of March 24, 1921 (P. L. 51).

See forms 1, 10, 12, 13, 35, 40, 42.

Where letters of administration have been granted to a niece and nephew, there being no children, and without information to the register of other nieces and nephews, the register may revoke said letters in the interest of all concerned, and to correct an honorable misunderstanding.

Sec. 2, clause d, Act of 1917, P. L. 447, is mandatory and every application for letters should be by petition, setting forth, *inter alia*, names and residences of all the next of kin.

Sharpless' Est., 28 Dist. 746, 15 Del. 16, 20 Luz. 161.

359. LETTERS OF ADMINISTRATION C. T. A. AND D. B. N.,—GRANTING LETTERS C. T. A.

SECTION 3. (a) Whenever the executors named in any last will and testament shall all refuse or renounce the trust and execution thereof, the register having jurisdiction as aforesaid may receive the probate of such will, and grant letters of administration with it annexed, to the persons by law entitled thereto.

NOTE.—This is Section 18 of the Act of 1832, 1 Purd. 1074, which corresponded to Section 17 of the Commissioners' Draft, and was intended to provide "for cases of intestacy by the renunciation of the trust of execution by all the executors." The Commissioners referred to the Statute of 21 Henry VIII, c. 5, Section 3, Rob. Dig. 250, as mentioning this case.

See forms 12, 42.

360. GRANTING OF LETTERS D. B. N. C. T. A.

(b) Whenever a sole executor, or the survivor, of several executors, shall die, leaving goods or estate of his testator unadministered, the register having jurisdiction shall, notwithstanding such executor may have made his last will and testament, and appointed an executor or executors thereof, grant letters of administration of all such goods and estate, in the same manner as if such executor had died without having made any testament or last will; and the executor of such deceased executor shall in no case be deemed executor of the first testator.

NOTE.—This is Section 19 of the Act of March 15, 1832, P. L. 135, 1 Purd. 1074, which corresponded to Section 18 of the Commissioners' Draft.

By the common law, the trust of the sole executor might be transmitted to his executor, and the same was true as to the survivor of several executors. The Act of March 12, 1800, 3 Sm. L. 433, Section 3, enabled administrators with the will annexed to execute the powers conferred upon executors by will in relation to lands. The Commissioners remarked: "This act having thus provided for the cases in which the powers of the executor of an executor are most important, it is proposed by this section to abolish his powers altogether * * * We will only add that convenience in the administration of the two estates and the security of creditors and others interested in different rights recommend the adoption of the section under consideration."

See form 13.

361. GRANTING OF LETTERS D. B. N.

(c) In all cases where the administration of the estate of any decedent shall become vacant, by reason of death or of any decree of the orphans' court, or from any other cause, the register having jurisdiction shall, on proper proof being made of the fact, grant new letters, in such form as the case shall require, to the person or persons by law entitled thereto.

NOTE.—This is Section 20 of the Act of 1832, 1 Purd. 1075, which corresponded to Section 19 of the Commissioners' Draft, and was new in the Act of 1832. It is now changed by providing for vacancies caused by death or otherwise, and by substituting "proper proof being made of the fact" for "being certified thereof, under the seal of the said court."

362. POWERS OF EXECUTORS EXTENDED TO ADMINISTRATORS C. T. A.

(d) All and singular the powers, duties and liabilities of executors are hereby extended to administrators with a will annexed.

NOTE.—This is Section 67 of the Act of February 24, 1834, P. L. 73, 1 Purd. 1100, which was introduced in that act to avoid the necessity of particular provisions in the various sections. After "singular," the words "the provisions of this act relative to" have been omitted.

It seems unnecessary to re-enact Section 1 of the Act of February 7, 1814, P. L. 44 (6 Sm. L. 102), which provides:—

"All the powers and authorities vested in administrators with the will annexed, in case of death, refusal, renouncing or dismissal of the executor or executors, by the act to which this is supplementary, be and are hereby extended to, and vested in administrators with the will annexed, in those cases where no executor or executors shall have been appointed, to be

exercised as fully as any executor or executors might have done if appointed."

An administrator with a will annexed has the same powers and duties of an executor who made a contract for the sale of real estate, and can carry out such contract and give a good and legal title, since he has given bond at the time of qualifying. *Kiefer's Adm'r. v. Jones*, 50 Pa. C. C. 269, (s. c. sub nom *Daniel v. Jones*), 30 Dist. 633.

363. POWERS OF ADMINISTRATORS D. B. N.

(e) Administrators de bonis non, with or without a will annexed, shall have power to demand and recover from their predecessors in the administration, or their legal representatives, all moneys, goods and assets remaining in their hands due and belonging to the estate of the decedent, and to commence and prosecute actions upon promises made to such predecessors in their representative character, and to take and defend appeals and sue forth and defend writs of scire facias and writs of execution upon judgments, obtained by or in the name of the executors or administrators into whose place they may have come, and also to proceed with and perfect all unexecuted executions, which may have been issued thereon at the instance of such predecessors: *Provided*, That when any suit shall have been brought by an administrator de bonis non for the recovery of moneys, goods or assets, remaining in the hands of his predecessors, or their legal representatives, before they shall have settled their final administration account, the court in which such action shall be brought shall have power to stay the proceedings therein, on the defendants' filing such an account in the register's office of the proper county within a reasonable time to be fixed by said court, until said account shall have been finally settled and confirmed; and on the production of a certified copy of said account, so settled and confirmed, the court in which such suit shall be pending is hereby authorized and required to render judgment for the balance which shall thereby appear to be due to either party.

NOTE.—This is Section 31 of the Act of 1834, 1 Purd. 1112, which corresponded to Section 32 of the Commissioners' Draft, except that the draft did not include the proviso. "Take and defend appeals" has been inserted and "of error" omitted. The provision as to time for filing the account is changed. The Act of 1834 makes it "twenty days previous to the term next succeeding that to which the writ was returnable." "Confirmed" has been substituted for "adjusted."

Section 32 of the draft considerably enlarged the provisions of the Statute of 17 Car. II, Chapter 8, Section 11, and was intended to remedy a defect in the law. The Commissioners referred to the decision in *Allen v. Irwin*, 1 S. & R. 549, that an administrator d. b. n. could not maintain assumpsit against the administrators of a deceased executor.

364. GRANTING OF LETTERS DURANTE MINORITATE, DURANTE ABSENTIA AND PENDENTE LITE.

SECTION 4. The register of wills having jurisdiction may, when the circumstances of the case require, grant to any fit person or persons letters of administration durante minoritate, durante absentia, or pendente lite, security to be entered as in other cases of administration.

NOTE.—This is a new section, giving express sanction to powers now exercised by registers as to letters durante absentia and pendente lite, and superseding Section 23 of the Act of March 15, 1832, P. L. 135, 1 *Purd.* 1083, which provides:—

“Whenever all the executors named in any last will and testament, or all the persons entitled as kindred to the administration of any decedent’s estate, shall happen to be under the age of twenty-one years, it shall be lawful for the register to grant administration as aforesaid to any other fit person or persons, subject nevertheless to be terminated at the instance of any of the said minors who shall have arrived at the full age of twenty-one years.”

In a dispute over the probate of a will, the grant of letters of administration pendente lite by the register of wills was held void where on petition the orphans’ court had directed the register to certify the record for adjudication, but prior to the service of said order an order had been made by the register but the oath had not been taken or bond given until after such service. The Fiduciaries Act of 1917, P. L. 447, requires that the oath must be administered and a bond given before letters of administration can issue.

“Jurisdiction is in the register to grant letters of administration generally, including letters pendente lite under special circumstances and the proceeding is well defined.

Section 4 of the Fiduciaries Act of 1917 provides that the register ‘may, when the circumstances of the case require, grant to any fit person or persons letters * * * pendente lite, security to be entered as in other cases of administration.’ But Section 7, Par. a, of said act, provides that before the register issue letters, he shall administer an oath in the prescribed form: Section 8, Par. a, provides that upon his grant of letters he shall take a bond as there required. If he grant such letters (Par. d of said section) without these prerequisites ‘such letters shall be void.’ Letters are not to issue unless bond has been previously given, *Moore v. Rahm*, 2 S. & R. 375; in such a case by the very terms of the law the

letters are void, *Bradley v. The Commonwealth*, 31 Pa. 522; failure to take the oath at the time may not per se void the grant of letters, but failure to give the bond has a very different effect, *Beeber's Appeal*, 99 Pa. 596; the register having made his selection, *Hawkins' Orphans' Court Practice*, Section 28, the next steps are the oath, and the bond, 'and thereupon issue letters of administration.'

"The register's appointment as of October 19th was not a grant of letters, it had no status as such by law or in practice." *Henry's Est.*, 30 Dist. 945, 69 P. L. J. 737; 35 York 122.

365. ACTS OF ADMINISTRATOR OR EXECUTOR NOT TO BE IMPEACHED ALTHOUGH WILL OR LATER WILL, BE DISCOVERED.

SECTION 5. All such acts of administration as would be in due course of law, in case of intestacy, if done in good faith and without notice of a will, and all such acts of any executor as would be in due course of law, if the will under which letters testamentary were issued were the last will of the testator, and if done in good faith and without notice of a later will, shall not be impeached, though a will, or a later will, should afterwards be discovered and established.

NOTE.—This Section 68 of the Act of 1834, 1 Purd. 1100, enlarged to include acts of an executor under a former will in case a later will is discovered. The Commissioners of 1830 remarked that this section was "in conformity with the obvious rules of equity and justice, and with the jurisprudence of some of our sister states."

366. PRESUMED DECEDENTS,—PETITION AND ADVERTISEMENT.

SECTION 6. (a) Whenever, hereafter, any person shall be presumed to be dead, on account of absence for seven or more years from the place of his or her last domicile, whether the same be within this commonwealth, or in any other state, territory or possession of the United States, or in any foreign country, any person entitled under the last will and testament of such presumed decedent or under the intestate laws to any share in his or her estate within this commonwealth, or the escheator for the commonwealth, may present a petition to the orphans' court of the county of such person's last residence or, where the presumed decedent was a non-resident of this commonwealth, in the orphans' court of the county where the greater part of his property within this commonwealth may be situated, setting forth the facts which raise the presumption of death. The said court, if satis-

fied as to the person who would be entitled to letters testamentary or of administration were the presumed decedent in fact dead, shall cause to be advertised, in a newspaper published in said county, once a week for four successive weeks, together with such other advertisement as the court, according to the circumstances of the case, shall deem expedient or advisable, the fact of such application, together with notice that on a day certain, which shall be at least two weeks after the last appearance of said advertisement, the court, or master appointed by the court for that purpose, will hear evidence concerning the alleged absence of the presumed decedent, and the circumstances and duration thereof.

NOTE.—This is a combination of Section 1 of the Act of June 24, 1885, P. L. 155, 1 Purd. 1075, and Section 1 of the Act of May 28, 1913, P. L. 369, 5 Purd. 5886.

The latter act is followed in providing for application in the first instance to the orphans' court. This seems to be the better practice, as there is no apparent reason for applying to the register and having him at once certify the matter to the court.

The section has been altered so as to include cases where the last domicile was outside the commonwealth. This is now covered, but as to ancillary letters only, by Section 9 of the Act of May 28, 1913, P. L. 373, 5 Purd. 5884, 5886.

The provisions have been extended to cases where the presumed decedent has left a will, which is produced in the first instance. The case of production of a will after letters of administration have been granted is covered by clause (k) of this section (see 376 *infra*). A provision for additional advertisements has been inserted.

"The Act of 1855 as well as the Fiduciaries Act provides a complete system for the distribution of estates of supposed decedents with a view to protect and safeguard the rights of all parties concerned." Twining's Est., 37 Montg. 116.

367. PETITION AND ADVERTISEMENT AS TO ANCILLARY LETTERS.

(b) Whenever, hereafter, letters of administration or letters testamentary shall have been granted in any other state, territory or possession of the United States, or in any foreign country, on the estate of a resident thereof, presumed to be dead, on account of absence for seven or more years from the place of his last domicile, it shall be lawful for the person or persons, or trust company, to whom such letters have been granted, to present a petition to the orphans' court of the county within this commonwealth in which all, or the greater portion, of the estate of said

presumed decedent may be found, accompanied by a complete exemplification of the record of the grant of such letters, praying for the grant of ancillary letters testamentary or of administration upon the estate of such presumed decedent, situate, owing or belonging to him within this commonwealth. The said court, if satisfied that the person or trust company proposed in such petition would be a fit person or company to whom such letters might be issued, shall cause publication to be made, in the manner and for the period as provided in clause (a) of this section, of the fact of such application, together with notice that on a day certain, which shall be at least two weeks after the last appearance of said advertisement, the court, or a master appointed for the purpose, will hear evidence concerning the alleged absence of the presumed decedent, and the circumstances and duration thereof.

NOTE.—This is Section 1 of the Act of May 28, 1913, P. L. 373, 5 Purd. 5884, somewhat condensed and with slight changes in wording so as to make the language uniform with that of the last preceding clause. The definition of "the proper county" contained in Section 8 of the Act of 1913 is embodied in the present clause; and the provision for application to the register of wills is omitted. Provision is made for the grant of ancillary letters to others than the domiciliary executor or administrator. Cross-reference is made to the last preceding clause as to manner and time of advertisement.

Section 2 of the Act of 1913, 5 Purd. 5885, providing for affidavits by residents of the ward, etc., where the presumed decedent was last known to reside, is recommended for repeal.

368. HEARING BY COURT, OR BY EXAMINER AND MASTER; COMPETENCY OF WITNESSES.

(c) At the hearing in either of the cases provided for in the preceding clauses of this section, the orphans' court shall take such legal evidence as shall be offered, for the purpose of ascertaining whether the presumption of death is established, or may appoint a master to take such testimony and report his findings thereon; and no person shall be disqualified to testify by reason of his or her relationship as husband or wife to the presumed decedent, or of his or her interest in the estate of the presumed decedent.

NOTE.—This embodies the provisions of Section 2 of the Act of June 24, 1885, P. L. 155, 1 Purd. 1075, Section 2 of the Act of May 28, 1913, P. L. 369, 5 Purd. 5886, and Section 3 of the Act of May 28 1913 P. L. 373, 5 Purd. 5885. The provision for the appointment of a master is new.

369. DECREE THAT PRESUMPTION OF DEATH IS MADE OUT, AND ADVERTISEMENT THERE-OF.

(*d*) If satisfied, upon such hearing, or upon the report of such master, that the legal presumption of death is made out, the court shall so decree, and the court may determine in such decree the date when such presumption arose, and shall forthwith cause to be published for three successive weeks, in the manner provided in clause (*a*) of this section, a notice requiring the presumed decedent, if alive, to produce in court satisfactory evidence of his continuance in life, such evidence to be produced within twelve weeks from the date of the last publication of the notice in the case of an original application for the grant of letters, and within four weeks from such date in the case of an application for ancillary letters.

NOTE.—This is a combination of Section 3 of the Act of June 24, 1885, P. L. 155, 1 Purd. 1076, Section 3 of the Act of May 28, 1913, P. L. 369, 5 Purd. 5886, and Section 4 of the Act of May 28, 1913, P. L. 373, 5 Purd. 5885, the four weeks' limitation in the case of ancillary letters being derived from the latter act. The provision as to determining the date when the presumption arose is new.

370. CONFIRMATION OR VACATION OF DECREE.

(*e*) If, within said period, evidence satisfactory to the orphans' court of the continuance in life of the presumed decedent shall be presented, said decree shall be vacated; but if such evidence shall not be forthcoming, such decree shall be confirmed absolutely, and it shall be the duty of the court to order the register of wills to issue letters of administration to the person thereto entitled, or to receive for probate the last will and testament of such presumed decedent and, if duly proved, to admit the same to probate and issue letters testamentary thereunder; and the said letters, until revoked, and all acts done in pursuance thereof and in reliance thereupon, shall be as valid as if the presumed decedent were really dead.

NOTE.—This is a combination of Section 4 of the Act of June 24, 1885, P. L. 155, 1 Purd. 1076, Section 4 of the Act of May 28, 1913, P. L. 369, 5 Purd. 5886, and Section 5 of the Act of May 28, 1913, P. L. 373, 5 Purd. 5885.

The word "vacated" has been substituted for "annulled" in the third line; and the provision as to probate is new.

371. EFFECT AS TO REAL ESTATE; TITLE OF PURCHASER; BOND BY PARTY SELLING OR CONVEYING.

(f) Whenever the said court shall enter a decree that the presumption of death of any person has been established, and such decree shall be confirmed absolutely, the real estate of the presumed decedent shall pass and devolve as in the case of actual death, and the persons entitled by will or under the intestate laws may enter and take possession. In case the presumption of death is thereafter rebutted by adequate proof that the presumed decedent is in fact alive, and said decree is vacated, said real estate shall revert to him as fully as though such decree had never been entered, subject, however, to payment of the costs and expenses of the proceedings and advertisement aforesaid. Such decree, when confirmed absolutely, may be recorded in the office of the recorder of deeds of the proper county in the deed-book, and shall be indexed by the recorder in the grantors' index under the name of the decedent, and in the grantees' index under the names of the persons taking the real estate, and, if so recorded, and the persons taking the real estate sell or mortgage the same, the purchaser or mortgagee shall take a good title, free and discharged of any interest or claim of the presumed decedent; but the persons taking such real estate shall not sell, convey or mortgage the same or any part thereof without first giving bond, in an amount to be fixed by the orphans' court and with sureties to be approved by said court, conditioned to account for and pay over to the presumed decedent, in case he is actually alive, the value of the real estate sold or conveyed, or, in case of the making of a mortgage, to pay the amount of the mortgage and interest thereon, or, in case of a foreclosure of such mortgage, to account for and pay over the value of the real estate mortgage. When the presumed decedent shall have been absent and unheard of for twenty-one years, such bond shall be taken without sureties.

NOTE.—This is Section 5 of the Act of May 28, 1913, P. L. 369, 5 Purd. 5886, with some changes in phraseology, and altered so as to require bond for the value of the property on any conveyance, instead of merely for the proceeds of sale, and to cover the case of a mortgage of the property.

372. ADMINISTRATION AND DISTRIBUTION OF ESTATE.

(g) The executor or administrator to whom letters have been issued upon the estate of a presumed decedent, as aforesaid, shall

administer the estate in the same manner and with the same effect as the same would be administered under existing laws of this commonwealth if the presumed decedent were in fact dead; and the orphans' court, at the audit of the account of an ancillary administrator of a presumed decedent, shall decree the balance, if any, shown thereby, to the expense of administration and the debts of the presumed decedent, due to residents of this commonwealth, and the overplus, if any, to the executor or administrator of said presumed decedent in the foreign jurisdiction, for the purpose of administration and distribution.

NOTE.—This is Section 6 of the Act of May 28, 1913, P. L. 373, 5 Purd. 5885, with the insertion of the words "executor or" and the omission of the word "ancillary" in the first line, thus making the provisions of the first six lines apply to original as well as ancillary administration. The following parts are confined to ancillary administration.

The provisos to the section read as follows:

Provided, however, 'That before any distribution of any such estate, the alleged creditors, residing in this commonwealth, shall respectively give sufficient security to be approved by the said court, in such sum and form as the court shall direct, with condition that, if the presumed decedent shall in fact be alive, they will respectively refund the amount received by each, with interest thereon, if they shall not be legally entitled to retain the same: *Provided further,* That before said court shall decree the payment of any overplus to the foreign executor or administrator as aforesaid, said court shall be satisfied that the presumption of death of the presumed decedent has been established in said foreign jurisdiction according to law."

(NOTE.—The above appears to be a résumé of the act and is not an exact quotation.—EDITOR).

The repeal of these provisos is recommended: the first because there seems to be no sufficient reason to require creditors who have been awarded payment of their just claims to refund the amounts because the presumed decedent proves to be alive; the second because, before directing the issuance of ancillary letters, the court has itself inquired into the establishment of the presumption of death.

373. REFUNDING BONDS; APPOINTMENT OF TRUSTEE ON REFUSAL, NEGLIGENCE, OR INABILITY TO GIVE BOND.

(h) Before any distribution of the proceeds of the estate of such presumed decedent, the persons, other than creditors, entitled to receive the same shall respectively give sufficient real or personal security, to be approved by the orphans' court having jurisdiction, in such sum and form as the court shall direct, with condition that if the said presumed decedent shall in fact be at

the time alive, they will respectively refund the amounts received by each on demand, with interest thereon. If any person or persons entitled to receive the same shall refuse or neglect or be unable to enter such security, the orphans' court may, upon petition of any person interested, and upon due notice to all persons interested, so far as such notice can reasonably be given, appoint a suitable person or corporation as trustee to receive and hold the share of the distributee refusing or neglecting or being unable to enter security as aforesaid until the further order of the court, such trustee not to be an insurer of the trust fund, and to be liable to the person or persons interested therein only for such care, prudence and diligence in the execution of the trust as other trustees are liable for. If the said court shall be satisfied, from the evidence adduced at the hearing to ascertain whether the presumption of death is established, or from the report of the master, that there is no likelihood of the presumed decedent's being still alive, then the said court may, at its discretion, accept refunding bonds from the distributees of the presumed decedent's estate without requiring sureties thereon.

NOTE.—This is the second proviso to Section 5 of the Act of June 24, 1885, 1 Purd. 1076, as amended by the Act of June 11, 1915, P. L. 945, 5 Purd. 5887, now changed by excluding creditors from the requirement of refunding bonds, and by conforming the provisions where no bond is given to those of Section 23 of this draft relating to security by legatees for life, founded on the Act of May 17, 1871, P. L. 269.

The present clause also covers Section 7 of the Act of May 28, 1913, P. L. 373, 5 Purd. 5886.

Under the Act of June 11, 1915 (P. L. 945), amending the Absentee Act of 1885, which amendment was incorporated in the Fiduciaries Act of 1917, it is within the discretion of the orphans' court when satisfied from evidence adduced at an audit that there is no likelihood of a supposed absentee decedent being alive, to decree distribution on refunding bonds, without security. *Howe's Estate*, 49 Pa. C. C. 261, 68 P. L. J., 301, 29 Dist. 436, 34 York 7.

374. VACATION OF DECREE; EFFECT AS TO ACTS DONE.

(i) The orphans' court may revoke the said letters and vacate the decree that the presumption of death has been established, at any time, on due and satisfactory proof that the presumed decedent is in fact alive. After such revocation all the powers of the executor or administrator shall cease, but all receipts or dis-

bursements of assets, and other acts previously done by him, shall remain as valid as if the said letters were unrevoked. The executor or administrator shall settle an account of his administration down to the time of such revocation, and shall transfer all assets, remaining in his hands, to the person as whose executor or administrator he has acted, or to his duly authorized agent or attorney. Nothing in this section contained shall validate the title of any person to any money or property received as surviving spouse, next of kin, heir, legatee or devisee of such presumed decedent, but the same may be recovered from such person, in all cases in which such recovery would be had, if this act had not been passed.

NOTE.—This is the first part of Section 5 of the Act of June 24, 1885, 1 *Purd.* 1076, as amended by the Act of June 11, 1915, P. L. 945, 5 *Purd.* 5887, with slight changes in wording, the inclusion of executors as well as administrators, and the insertion of the provision for vacation of the decree that the presumption of death has been established.

375. INTERVENTION IN ACTIONS BY PERSON ERRONEOUSLY SUPPOSED TO BE DEAD; OPENING OF JUDGMENTS.

(j) After revocation of the letters and vacation of the decree that the presumption of death has been established, the person erroneously presumed to be dead may, on suggestion filed of record of the proper facts, be substituted as plaintiff or petitioner in all actions or proceedings, at law, in equity, or in any orphans' court, brought by the executor or administrator, whether prosecuted to judgment or decree or otherwise. He may, in all actions or proceedings previously brought against the executor or administrator, be substituted as defendant or respondent, on proper suggestion filed by himself, or by proper service of writ or other process, but shall not be compelled to go to trial in less than three months from the time of such suggestion filed or process served. Judgments or decrees recovered against the executor or administrator before revocation and vacation, as aforesaid, of the letters and decree, may be opened on application by the presumed decedent, made within three months from the said revocation and supported by affidavit, denying specifically, on the knowledge of the affiant, the cause of action, or specifically alleging the existence of facts which would be a valid defense; but if, within the said three months, such application shall not be made, or being made, the facts exhibited shall be adjudged an insufficient defense,

the judgment or decree shall be conclusive to all intents, saving the defendant's right to have it reviewed, as in other cases, on appeal. Notwithstanding the substitution of the presumed decedent as defendant in any judgment or decree, as aforesaid, it shall continue as a lien upon his real estate in the county for the period of five years from the date of its entry, as other judgments, unless and until it shall be set aside by the court below, or reversed in the proper appellate court.

NOTE.—This is Section 6 of the Act of June 24, 1885, P. L. 155, 1 *Purd.* 1076, altered by inserting the references to vacation of the decree, by substituting the words "on appeal" for "by certiorari or writ of error," by substituting "the proper appellate court" for "the supreme court" in the last line, and by redrafting the last sentence, which, in the Act of 1885, provides that after substitution the judgment shall "become a lien" and shall so continue for five years, without stating when the five years shall begin.

376. PROCEDURE WHERE WILL, OR LATER WILL, IS PRODUCED AFTER LETTERS HAVE BEEN GRANTED.

(k) Whenever, hereafter, letters testamentary or of administration shall be issued upon the estate of any person, presumed to be dead, on account of absence of seven years or more from the place of his last domicile, in accordance with the foregoing provisions of this section, the person having custody of any will which may have been left by such presumed decedent, in case letters of administration have been issued, or of any later will, in case letters testamentary have been issued, or any creditor or any person interested in the estate, may file a petition in the orphans' court in which the proceedings to establish the death by presumption have been held, as aforesaid, setting forth the facts of the case, a copy of said will or later will, or an averment that such will exists, and the names of all persons interested in the estate of the presumed decedent. Upon the filing of such petition, said court, after due notice to all parties in interest, may enter an order directing the register of wills to receive proof in support of the averments of said petition and, if established, to admit said will or later will to probate and, if an executor be named in said will, to revoke said letters of administration, or, in case an earlier will shall have been admitted to probate, to set aside such probate and revoke the letters testamentary issued thereunder.

NOTE.—This is Section 1 of the Act of April 14, 1905, P. L. 153, 5 *Purd.* 5884, altered by providing for the filing of a petition in the orphans' court,

instead of proceeding directly before the register, and by inserting the words "or an averment that such will exists," to cover the case of refusal to produce the will or its unlawful destruction, and also altered so as to include the case of a later will.

377. CITATION BY REGISTER TO PARTIES INTERESTED.

(*l*) Thereupon the register of wills shall issue a citation to the person to whom letters of administration or letters testamentary have been issued, as aforesaid, and to all persons interested in the estate of the presumed decedent, to appear upon a day fixed, and to show cause why the said alleged will or later will should not be admitted to probate.

NOTE.—This is Section 2 of the Act of April 14, 1905, P. L. 153, 5 Purd. 5884, changed to conform to the changes made in the last preceding clause.

378. PROBATE OF WILL, OR LATER WILL; REVOCATION OF LETTERS AND GRANTING NEW LETTERS.

(*m*) Upon the return of the citation, if the register of wills shall be satisfied from all the evidence that may be adduced that the proposed will was, in fact, the last will and testament made by the presumed decedent before his departure or disappearance from his residence, the said will shall be admitted to probate as if the testator were in fact dead. If, upon such probate, it appears that an executor is named in the will, the letters of administration previously granted shall be revoked, and letters testamentary shall be issued to said executor, in the same manner and form as if the testator were in fact dead, but if no executor shall be named in such will, then a certified copy of said will shall be attached to the letters of administration theretofore issued, or to a certified copy of such letters. Thereafter the executor or administrator shall execute the said will according to its terms, and all property of the decedent shall be distributed and pass, as provided by said will, to the several legatees and devisees named therein. In case an earlier will shall have been admitted to probate, the letters testamentary issued thereunder shall be revoked and letters shall be issued under the said last will, or if no executor shall be named in said last will, then letters of administration with the will annexed shall be issued to the person or persons entitled thereto.

NOTE.—This is Section 3 of the Act of April 14, 1905, as amended by the Act of June 1, 1915, P. L. 689, 5 Purd. 5884, further altered by bringing the last proviso into the body of the section, and by providing for the case of a later will.

The remaining proviso reads: "*Provided*, That nothing herein shall prevent the orphans' court from revoking the said letters, * * * upon satisfactory proof that the supposed decedent is in fact alive; after which revocation the powers of the (executor or) administrator, and the rights of the legatees and devisees under said will, shall cease; and all receipts and disbursements of assets, and other acts previously done by them shall remain as valid as if the said letters were unrevoked; and providing that legatees and devisees may be called upon, at any time, by the supposed decedent to account for any property which they may have received, remaining in their hands, exactly as * * * the (executor or) administrator may be called upon to account for such property or assets."

It is recommended that this be omitted as unnecessary, its provisions being covered by other clauses of this section.

379. PAYMENT OF COSTS.

(n) The costs attending the issuance or revocation of letters shall be paid out of the estate of the presumed decedent; and costs arising upon an application for letters which shall not be granted shall be paid by the applicant.

NOTE.—This Section 7 of the Act of June 24, 1885, P. L. 155, 1 Purd. 1077.

380. OATHS OF EXECUTORS AND ADMINISTRATORS,—FORM.

SECTION 7. (a) Before any register shall issue letters of administration, letters testamentary, or of administration with the will annexed, he shall administer an oath or affirmation to the person or persons receiving the same, in the following form, viz: You do swear (or affirm) that as executor of the last will and testament (or as administrator of the estate) of A. B., deceased, (as the case may be), you will well and truly administer the goods and chattels, rights and credits of said deceased, according to law; and also will diligently and faithfully regard and well and truly comply with the provisions of the law relating to collateral inheritances.

NOTE.—This is Section 14 of the Act of March 15, 1832, 1 Purd. 1075, which, as the Commissioners remarked, contained in the form of oath the clause as to collateral inheritance required by Section 5 of the Act of April 7, 1826, P. L. 227.

In a dispute over the probate of a will, the grant of letters of administration pendente lite by the register of wills was held void where on petition the orphans' court had directed the register to certify the record for adjudication, but prior to the service of said order an order had been made by the register but the oath had not been taken or bond given until after such service. The Fiduciaries Act of 1917, P. L. 447 requires that the oath must be administered and a bond given before letters of administration can issue.

"Jurisdiction is in the register to grant letters of administration generally, including letters pendente lite under special circumstances and the proceeding is well defined.

Section 4 of the Fiduciaries Act of 1917 provides that the register 'may, when the circumstances of the case require, grant to any fit person or persons letters * * * pendente lite, security to be entered as in other cases of administration.' But Section 7, Par. a, of said act, provides that before the register issue letters, he shall administer an oath in the prescribed form: Section 8, Par. a, provides that upon his grant of letters he shall take a bond as there required. If he grant such letters (Par. d of said section) without these prerequisites 'such letters shall be void.' Letters are not to issue unless bond has been previously given, *Moore v. Rahm*, 2 S. & R. 375; in such a case by the very terms of the law the letters are void, *Bradley v. the Commonwealth*, 31 Pa. 522; failure to take the oath at the time may not per se void the grant of letters but failure to give the bond has a very different effect, *Beeber's Appeal*, 99 Pa. 596; the register having made his selection, *Hawkin's Orphans' Court Practice*, Section 28, the next steps are the oath, and the bond, 'and thereupon issue letters of administration.'

"The register's appointment as of October 19th was not a grant of letters; it had no status as such by law or in practice." *Henry's Est.*, 30 Dist. 945, 69 P. L. J. 737; 35 York 122.

381. OATH BY OFFICER OF CORPORATION.

(b) In all cases where a corporation is or shall be charged with the execution of any trust, the president, vice-president, trust officer, secretary, treasurer or actuary of such corporation, shall make the oath or affirmation directed to be taken by private persons in such cases.

NOTE.—This is Section 1 of the Act of February 16, 1877, P. L. 3, 4 *Purd.* 4923.

See forms 2, 11, 46.

382. BONDS OF EXECUTORS AND ADMINISTRATORS,—FORM OF BOND OF ADMINISTRATOR.

SECTION 8. (a) It shall be the duty of every register upon his granting any letters of administration, domiciliary or ancillary,

of the goods and chattels of any person dying intestate, to take a bond or bonds, from the person or persons receiving such letters, with two or more sufficient individual sureties, or sufficient corporate security, or the register may, in his discretion, permit any corporation to which letters are granted to give its own bond without surety. In fixing the amount of any bond, respect shall be had to the value of the estate; and all bonds shall be in the name of the commonwealth, with a condition in the following form, viz.: The condition of this obligation is, that if the above-bounden A. B., administrator of all and singular the goods, chattels and credits of C. D., deceased, do make, or cause to be made, a true and perfect inventory of all and singular the goods, chattels and credits of the said deceased, which have come or shall come to the hands, possession or knowledge of him the said A. B., or into the hands and possession of any other person or persons, for him, and the same so made, do exhibit or cause to be exhibited into the register's office, in the county of _____, within thirty days from the date hereof, and the same goods, chattels and credits, and all other the goods, chattels and credits of the said deceased, at the time of his death, which at any time after shall come to the hands and possession of the said A. B., or into the hands and possession of any other person or persons for him, do well and truly administer according to law, and further do make or cause to be made, a just and true account of his said administration, at the expiration of six months from the date hereof, or when thereunto required by the orphans' court, and all the rest and residue of the said goods, chattels and credits, which shall be found remaining upon the said administrator's account, the same being first examined and allowed by the orphans' court of the county having jurisdiction, shall deliver and pay unto such person or persons as the said orphans' court, by their decree or sentence pursuant to law, shall limit and appoint, and shall well and truly comply with the laws of this commonwealth relating to collateral inheritances, and if it shall hereafter appear that any last will and testament was made by the said deceased, and the same shall be proved according to law, if the said A. B., being thereunto required, do surrender the said letters of administration into the register's office aforesaid, then this obligation to be void, otherwise to remain in full force: *Provided*, That in every case of special administration, the form of the foregoing condition shall be modified so as to suit the circumstances of such case.

NOTE.—This is Section 24 of the Act of March 15, 1832, P. L. 139, 1 Purd. 1077, altered by inserting "domiciliary or ancillary" in the second line, by providing for two individual sureties or corporate security or the bond, without surety, of a corporation to which letters are granted, by changing "one year" to "six months" as the period for filing the account, and substituting "at the expiration of" for "within," and by substituting "required by the orphans' court" for "legally required."

Section 24 of the Act of 1832 corresponded to Section 23 of the Commissioners draft. This was substantially the same as Section 1 of the Act of April 19, 1794, 3 Sm. L. 143, with some verbal alterations and the addition of a clause as to collateral inheritances, and the proviso as to special administration. The draft fixed the time for filing the inventory at forty days, while the act made it thirty days. The same difference exists between Section 16 of the Act of 1832 and the draft.

See forms II, 14, 41, 43.

See Cooper's Est., 29 Dist. 230, 67 R. L. J. 17, 20 Lack. 46, 36 Lanc. 266, 32 York 144.

In a dispute over the probate of a will, the grant or letters of administration pendente lite by the register of wills was held void where on petition the orphans' court had directed the register to certify the record for adjudication, but prior to the service of said order an order had been made by the register but the oath had not been taken or bond given until after such service. The Fiduciaries Act of 1917, P. L. 447 requires that the oath must be administered and a bond given before letters of administration can issue.

"Jurisdiction is in the register to grant letters of administration generally, including letters pendente lite under special circumstances and the proceeding is well defined.

"Section 4 of the Fiduciaries Act 1917 provides that the register 'may, when the circumstances of the case require, grant to any fit person or persons letters * * * pendente lite, security to be entered as in other cases of administration.' But Section 7, Par. a, of said act, provides that before the register issue letters, he shall administer an oath in the prescribed form: Section 8, Par. a, provides that upon his grant of letters he shall take a bond as there required. If he grant such letters (Par. d of said section) without these prerequisites, 'such letters shall be void.' Letters are not to issue unless bond has been previously given, *Moore v. Rahm*, 2 S. & R. 375; in such a case by the very terms of the law the letters are void, *Bradley v. the Commonwealth*, 31 Pa. 522; failure to take the oath at the time may not per se void the grant of letters but failure to give the bond has a very different effect, *Beeber's Appeal*, 99 Pa. 596; the register having made his selection, *Hawkin's Orphans' Court Practice*, Section 28, the next steps are the oath, and the bond, 'and thereupon issue letters of administration.'

"The register's appointment as of October 19th, was not a grant of letters; it had no status as such by law or in practice." *Henry's Est.*, 30 Dist. 945, 69 P. L. J. 737; 35 York 122.

383. BOND OF ADMINISTRATOR C. T. A.

(b) It shall be the duty of the register of wills, in granting letters of administration with the will annexed, to take a bond as prescribed in the foregoing clause, that shall include adequate security for the faithful accounting for the proceeds of any sales of real estate the administrator may make under such will; and the sureties taken shall be liable therefor, as well as for any personal effects, to come into the hands of the administrator, who shall settle his account thereof before the orphans' court.

NOTE.—This is founded on Section 8 of the Act of April 22, 1856, P. L. 533, 1 *Purd.* 1080. The proviso is omitted; "a bond as prescribed in the foregoing clause, that shall include," is inserted; "shall" is substituted for "may" in the provision as to liability; and "register and" is omitted before "orphans' court" in the last line.

See forms 11, 14, 41, 44.

In holding, on the authority of *Cornell v. Green*, 10 S. & R. 14, that "An administrator with the will annexed is, for every purpose connected with the execution of the will, put exactly in the place of the executor who preceded him; and clothed with all his rights and invested with all his capacities of collecting debts, maintaining actions, and selling real estate pursuant to the will." The court, citing the above section, said: "When the administrator with a will annexed was appointed in this case, he found an unexecuted contract for the sale of the real estate in question. He qualified by giving his bond. He has the same powers and duties that the surviving executor who made this contract had. The bond, under the terms of the statute, covers the sales of real estate made under the will. We, therefore, are of opinion that the executor has the right to carry out this contract and can give a good and legal title to the defendant." *Kiefer's Adm'r. v. Jones*, 50 Pa. C. C. 269 (s. c. sub nom. *Daniel v. Jones*), 30 *Dist.* 633.

384. FORM OF BOND OF NON-RESIDENT EXECUTOR.

(c) Before the register shall issue letters testamentary to any executor, not being an inhabitant of this commonwealth, he shall take from him a bond, with two or more sufficient individual sureties, being inhabitants of this commonwealth, or with sufficient corporate security, or the register may, in his discretion, permit any corporation to which such letters are granted to give its own bond without surety. In fixing the amount of any bond, respect shall be had to the value of the estate to be administered; and all bonds shall be in the name of the commonwealth, with the

following condition, viz.: The condition of this obligation is, that the said A. B., executor of the last will and testament of C. D. deceased shall make a true and perfect inventory of all and singular the goods, chattels and credits of the said deceased, being within this commonwealth, which have come or shall come to his hands, possession or knowledge, or into the hands and possession of any other person for him, and the same so made do exhibit into the office of the register of the county of within thirty days from the date hereof, and the same goods do well and truly administer, according to law, and make a just and true account of all his actings and doings therein, at the expiration of six months from the date hereof, or when thereunto lawfully required, and shall faithfully account for the proceeds of any sales of real estate he may make under such will, and shall well and truly comply with the laws of this commonwealth relating to collateral inheritances and in all other respects with the laws of this commonwealth relating to his duty as executor, then this obligation to be void, otherwise to remain in full force.

NOTE.—This is Section 16 of the Act of March 15, 1832, P. L. 139, 1 Purd. 1077, changing the period for filing an account from one year to six months, in accordance with the change made in the other parts of the present draft, changing “in” to “at the expiration of,” and inserting a provision as to corporations giving their own bonds, and a provision to cover sales of real estate corresponding to clause (b).

Section 16 of the Act of 1832 corresponded to Section 15 of the Commissioners’ Draft, and was new in the Act of 1832. The Commissioners remarked that the Act of April 3, 1829, P. L. 122, authorizing proceedings to vacate letters testamentary where the executor had removed from the state and ceased to have a known residence therein for a certain period, perhaps prohibited the granting of letters testamentary to non-residents.

See form 45.

385. GRANT OF LETTERS WITHOUT BOND;—LIABILITY OF REGISTER OF WILLS.

(d) If any register shall grant letters testamentary to any person not being an inhabitant of this commonwealth, or shall grant any letters of administration to any person or persons whatsoever, without having in either case taken a bond in the manner hereinbefore prescribed, such letters shall be void, and every person acting under them shall be deemed, and may be sued, and in all respects treated as an executor of his own wrong; and the register granting the same, and his sureties, shall be liable

to pay all damages which shall accrue to any person by reason thereof.

NOTE.—This is Section 27 of the Act of 1832, 1 Purd. 1078, which corresponded to Section 34 of the Commissioners' Draft. That section was principally derived from Section 2 of the Act of March 27, 1713, 1 Sm. L. 81, and contained nothing new except the extension of the provisions to letters testamentary granted to non-residents.

The only change now made is to omit "with sureties," in line 5, so as to cover cases of a corporation giving its own bond.

In a dispute over the probate of a will, the grant of letters of administration pendente lite by the register of wills was held void where on petition the orphans' court had directed the register to certify the record for adjudication, but prior to the service of said order an order had been made by the register but the oath had not been taken or bond given until after such service. The Fiduciaries Act of 1917, P. L. 447, requires that the oath must be administered and a bond given before letters of administration can issue.

"Jurisdiction is in the register to grant letters of administration generally, including letters pendente lite under special circumstances and the proceeding is well defined.

"Section 4 of the Fiduciaries Act of 1917 provides that the register 'may, when the circumstances of the case require, grant to any fit person or persons letters * * * pendente lite, security to be entered as in other cases of administration.' But Section 7, Par. a, of said act, provides that before the register issue letters, he shall administer an oath in the prescribed form: Section 8, Par. a, provides that upon his grant of letters he shall take a bond as there required. If he grant such letters (Par. d of said section) without these prerequisites, 'such letters shall be void.' Letters are not to issue unless bond has been previously given, *Moore v. Rahm*, 2 S. & R. 375; in such a case by the very terms of the law the letters are void, *Bradley v. the Commonwealth*, 31 Pa. 522; failure to take the oath at the time may not per se void the grant of letters but failure to give the bond has a very different effect, *Beeber's Appeal*, 99 Pa. 596; the register having made his selection, *Hawkin's Orphans' Court Practice*, Section 28, the next steps are the oath, and the bond, 'and thereupon issue letters of administration.'

"The register's appointment as of October 19th, was not a grant of letters; it had no status as such by law or in practice." *Henry's Est.*, 30 Dist. 945, 69 P. L. J. 737; 35 York 122.

386. BOND OF EXECUTOR OR ADMINISTRATOR OF DECEASED FIDUCIARY.

(e) In any case where application is made for letters testamentary or of administration on the estate of a decedent who was at the time of his death a fiduciary, it shall be within the discretion of the register of wills to whom such application is made to

require the person or corporation to whom such letters are issued to enter, in addition to any other bond required by this act, a bond in a sufficient amount, with sureties as aforesaid, or, in case of a corporation, its own bond, with or without sureties, conditioned for the proper application of the property held by such decedent as fiduciary and coming into the hands and possession of the person or corporation to whom such letters are issued.

NOTE.—This is a new clause, introduced to cover the case where moneys or property held by a decedent as executor, administrator, guardian or trustee, come into the possession of his executor or administrator pending the appointment of a successor to the decedent in the trust.

387. EXCEPTIONS TO BONDS.

(f) All bonds taken by any register, in pursuance of this act, from any executor or administrator, may be excepted to before such register by any person interested, in respect of the sufficiency of the sureties therein, or the amount of the bond, or for any other cause. Whenever any such exception shall be so made to any such bond, the register shall give notice thereof to the executor or administrator and require him to appear before him in a reasonable time, not exceeding ten days, and show cause against the allowance of such exception. If upon the hearing of the objections of all persons interested, and of such executor or administrator, or of such of them as shall appear, such register shall see cause, he shall order such executor or administrator to find additional sureties, or to give security in a larger amount, or make such other order as the case may require. If such executor or administrator shall refuse to comply with such order, or if he shall neglect so to do during the space of thirty days after the making thereof, the register shall revoke the letters granted to him, and grant other letters in such form as the case shall require, to the person by law next entitled thereto, such person giving to such register the security by him ordered as aforesaid. No such exception shall be so made, or proceedings thereunto be had before the register, after three months elapsed from the time of the filing of a full and perfect inventory by such executor or administrator of the whole of the estate in question.

NOTE.—This is Section 28 of the Act of 1832, 1 Purd. 1078, which corresponded to Section 35 of the Commissioners' Draft. That section was new in the Act of 1832 and was intended as a substitute for so much of Section 2 of the Act of March 27, 1713, 1 Sm. L. 81, as related to the taking of insufficient sureties, and to supply means by which the register

might revise his own proceedings and correct inadvertent and perhaps unavoidable errors.

The present draft changes "one year" in the last sentence to "three months" in accordance with the change in time for filing the account. It also permits exceptions "for any other cause."

Section 2 of the Act of April 4, 1797, 3 Sm. L. 296, 2 Purd. 2296, provides: "In all cases where a return of nulla bona shall have been made by the sheriff of the proper county to an execution against any such executors or administrators, their sureties shall, on notice thereof, unless they can show goods or chattels, lands or tenements, in some other county, which may be seized and taken in execution by a *testatum fieri facias*, to satisfy the same, be liable to pay the amount of the debt and costs therein, in actions brought against them on the said bonds, and such further proof or evidence in support thereof, as by law would have entitled the suitor or suitors to recover his, her or their demand of the said executors or administrators, *de bonis propriis*: *Provided*, Such suits shall be instituted against the sureties, within seven years after the date of the respective bonds; and the whole amount of the sums of money to be recovered thereupon shall not exceed the penalties of the said bonds respectively."

This was held, in *Com. v. Patterson*, 8 Watts 515, to be limited to cases of additional security given by order of court.

The appeal of this section of the Act of 1797, as unnecessary, is recommended.

388. BONDS OF FIDUCIARIES IN GENERAL,—SUITS ON BONDS.

SECTION 9. (a) All bonds given or hereafter to be given by fiduciaries shall be held in trust for the use of the commonwealth, and such person or persons as may be interested therein; and suits may be brought thereon, from time to time, by all persons interested therein, as provided in the sixth section of the act entitled, "An act relating to bonds, with penalties and official bonds," approved the 14th day of June, 1836.

NOTE.—This is Section 44 of the Act of March 15, 1832, 1 Purd. 1079, which did not correspond to anything in the Commissioners' Draft, altered by substituting for the reference there made to Section 4 of the Act of March 28, 1803, a reference to Section 6 of the Act of June 14, 1836, P. L. 639, 1 Purd. 472, and by substituting "fiduciaries" for "executors, administrators or guardians."

See forms, 22, 24.

389. REDUCTION OF BONDS.

(b) Whenever any fiduciary has heretofore given, or shall hereafter give, any bond conditioned for the due performance of his duties, or for the accounting for money in his hands, such

fiduciary or any creditor, beneficiary, or other party in interest, may present a petition to the orphans' court of the proper county, alleging that the amount of such bond is greater than the exigencies of said trust require and setting forth the facts and circumstances upon which such allegation is based, and praying that such bond be reduced to an amount which shall be stated in the petition. At the hearing of said petition, after such notice as the court may require, if any, the court may, at its discretion, reduce the bond to such an amount as it may deem proper and necessary to give adequate protection to all parties concerned, but not to an amount lower than that specified in said petition. The costs of said proceeding shall, at the discretion of the court, be paid out of the estate to protect which said bond was given, or by the petitioner.

NOTE.—This is a combination of Sections 2, 3 and 4 of the Act of May 3, 1915, P. L. 218, 6 Purd. 7038, changed so as to provide that the petition shall "allege" that the bond is too large, instead of "setting forth that in his opinion" this is so.

See form 75.

390. EXPENSE OF OBTAINING BOND OF CORPORATION.

(c) Any fiduciary, required by law or by the order of any orphans' court, to give a bond as such, may include as a part of the lawful expense of executing his trust such reasonable sum paid to a company, authorized under the laws of this state so to do, for becoming his surety on such bond as may be allowed by the court in which he is required to account, not exceeding, however, one per centum per annum on the amount of such bond.

NOTE.—This is Section 1 of the Act of June 24, 1895, P. L. 248, 4 Purd. 4914, altered by substituting "fiduciary" for "receiver, assignee, guardian, committee, trustee, executor or administrator," and by inserting the word "orphans."

Section 2 of the Act of 1895 reads: "This act shall take effect immediately; and all acts and parts of acts inconsistent herewith are hereby repealed."

The Act of 1895 should be repealed only so far as it relates to fiduciaries within the scope of the present act.

391. ADVERTISEMENT OF GRANT OF LETTERS.

SECTION 10. The executors or administrators of every decedent shall, immediately after the granting of letters testamentary or of administration to them, cause notice thereof to be given in one

newspaper, published at or near the place where such decedent resided, once a week, *and in the legal periodical, if any, designated by rule of court for the publication of legal notices,*¹ during at least six successive weeks, together with their names and places of residence, and in every such notice they shall request all persons having claims or demands against the estate of the said decedent to make known the same, and all persons indebted to the said decedent to make payment, to them without delay.

NOTE.—This is Section 1 of the Act of February 24 1834, P. L. 73, 1 Purd. 1098, with the addition of the provision as to notice to debtors.

Section 14 of the Act of April 19, 1794, 3 Sm. L. 143, provided: "That no creditor, who shall neglect to exhibit his account to the executors or administrators within twelve months after public notice given in one or more of the public newspapers of this state, and continued in such public newspapers for four weeks, shall be entitled to demand or receive any dividend of such remaining assets." This is superseded by Section 49 (d) of the present draft. (See 555 *infra*.)

See form 15.

¹The portion in italics did not appear in the Commissioners' Draft.

An account will not be audited until six months after advertisement of grant of letters.

In dismissing exceptions to this ruling the court in banc per GAST, J., held: "Letters of administration were granted on Nov. 10, 1917, and the account was filed on Sept. 5, 1918. The grant of letters was not advertised as required by the Fiduciaries Act of June 7, 1917, Section 10, P. L. 447, until Sept. 6, 1918, and the advertisement expired on Oct. 11th, shortly before the account was called for audit.

The provisions of section 10 of the Fiduciaries Act are not new, having been previously enacted in section 1 of the Act of Feb. 24, 1834, P. L. 70, Purd. 1098, and the commissioners of 1830, in their second report, observed as to this section that it "enlarged and supplied a provision in the Act of April 19, 1794, Section 14, 3 Sm. Laws, 143, relative to notice by executors and administrators to creditors of the decedent. It is directory to executors and administrators, and purports that immediate public notice shall in all cases be given of the granting of administration, &c. We think that it is due to creditors in all cases to require it, and it is to the interest of the heirs and kindred that it should be done without unnecessary delay."

Similar provisions are found in the statutes of nearly if not quite all of the states, and, as it is said in Woerner's American Law of Administration, Section 385, the omission to publish the notice to creditors is attended with serious consequences.

This requirement of the Fiduciaries Act is, therefore, no innovation, for in substantially its present form it had been in the statute book for eighty-three years. It is not necessary to vindicate its wisdom, nor is it necessary to decide the precise meaning of the word "immediately," as

used in the act, for in this case the advertisement was not published for nearly ten months. When a man dies and his estate comes into the course of administration, his creditors must be ascertained, and the only practicable method is by advertisement in the newspapers. Creditors have a right to this notice, and, inasmuch as the act requires immediate notice to be given by advertisement, and as subsequent sections require the account to be filed at the expiration of six months (formerly one year) after the grant of letters, creditors have also a right to assume that the account need not be looked for until six months have expired from the first insertion of the advertisement. When, therefore, the advertisement is delayed, counsel should be careful not to file the account until the expiration of six months from the date of the first insertion of the advertisement.

We have said that the Fiduciaries Act has not introduced any innovation in the law in this respect. It has, however, shortened the period allowed for administration from one year to six months, and, in view of this change, this court by its recent rule (II, Sec. 12) has required the accountant to submit to the auditing judge at the audit proof of publication of notice, in order that it may appear that creditors have had all the protection to which they are entitled by law. It appears that many members of the bar, including some of long practice and large experience, have omitted to advertise, but it is clear that the provisions of the statute cannot be disregarded, nor is it sufficient compliance with the law to postpone the advertisement of the grant of letters until the filing of the account or shortly before it. We are of opinion, therefore, that the auditing judge in this case was justified in withholding confirmation of the account. If the administratrix is confident that there remain no unpaid debts of the decedent, she may make distribution at her own risk, but if she desires the protection of a decree of the court under section 49 of the Fiduciaries Act, the provisions of the law must be complied with."

Cotter's Est., 47 Pa. C. C. 76, 27 Dist. 1023, 67 P. L. J. 19, and see Hayden's Est., 28 Dist. 39; Cooper's Est., 29 Dist. 230, 67 P. L. J. 17, 20 Lack. 46, 36 Lanc. 266, 32 York 144.

392. INVENTORY AND APPRAISEMENT,—TO BE FILED IN THIRTY DAYS.

SECTION 11. (a) It shall be the duty of the said executors or administrators to make a true and perfect inventory of all the goods, chattels and credits of the deceased, as far as they may know or can ascertain them, and file the same in the register's office within thirty days from the time of administration granted: *Provided*, That in the case of a will of a decedent, not resident, at the time of his decease, within this commonwealth, proved in another state or in a foreign country, whereof letters testamentary or of administration with the will annexed may be granted in this state, or in a case of ancillary administration of the estate of a non-resident intestate, the inventory herein mentioned shall be of the

goods, chattels and credits of the deceased within this commonwealth.

NOTE.—This is Section 15 of the Act of March 15, 1832, P. L. 135, 1 Purd. 1089, with the insertion of the provision as to ancillary administration of an intestate's estate. The provision as to the filing of the account has been omitted here and inserted in Section 46 (a). (See 539 *infra*.)

See forms 16, 52.

In dismissing a petition to restrain a proposed sale of decedent's effects including his alleged interest in a partnership which formed the major portion of the inventory the court said:

"Whether, therefore, the petition is construed to be an application made by a partner's individual estate or for a partnership estate, the applicant is without legal standing to maintain this proceeding in this Court; and, accordingly, this Court cannot recognize the complaints of the petitioner as to the form or substance of the said Inventory and Appraisement (see Fiduciaries Act of 1917, P. L. 447, clause (e), (this should apparently be clause a), Section 11), nor its standing to otherwise intermeddle in or interfere with, the administration of the said Walter J. Brown estate; and such incapacity will continue until the condition precedent has been fulfilled, to wit, by a proper, judicial determination of the existence of such partnership and a due adjudication of its business and affairs.

"Our action in dismissing the petitioner's petition is based exclusively on absence of jurisdiction in this Court; and the same is done without prejudice to the petitioner's right to seek redress in a tribunal of competent jurisdiction, having authority to determine the fact of partnership, control the proper winding up of the partnership business and affairs, compel a due accounting thereof, and, incidentally, if proper grounds be established, to restrain the consummation of the alleged wrongful conversion and proposed sale of partnership property and assets; enforcing its orders by attachments or through a receivership; Partnership Act, March 26, 1915, P. L. 18, Section 37." *Brown's Est.*, 1 Wash. 149.

393. PROCEDURE TO COMPEL FILING OF INVENTORY.

(b) In case of the failure or refusal of any executor or administrator to file an inventory as aforesaid, the orphans' court shall have power, on petition of any creditor of the decedent or any party in interest, to issue a citation to such executor or administrator to show cause why he should not file such inventory and, if no sufficient cause be shown on the return of such citation, said court may order the filing of such inventory, and may enforce such order by attachment as in other cases.

NOTE.—This is a new clause, introduced to provide a remedy in the case mentioned, additional to the remedy by the removal of the executor or administrator under Section 53 (a) 1 (see 566 *infra*), or by action on the

bond of an administrator, there being instances in which the only adequate remedy is by compelling the filing of the inventory.

**394. BONDS, NOTES, OTHER EVIDENCES OF DEBT,
ALL CLAIMS AND DEMANDS FOR MONEY
AND OTHER PERSONAL PROPERTY TO BE
INCLUDED IN INVENTORY.**

(c) All bonds, notes and other evidences of debt, also all other claims and demands for money, or any other personal property owned or held by the deceased at the time of his decease, shall, as far as the same may be known to his executors or administrators, be included in the inventory to be made and returned as aforesaid.

NOTE.—This is Section 5 of the Act of February 24, 1834, 1 Purd. 1090, which corresponded to Section 6 of the Commissioners' Draft.

The section was new in the Act of 1834 and was intended to correct a practice of omitting bonds and other evidences of debt from the inventory on the ground that they were not properly subjects of appraisalment.

**395. DEBT DUE BY EXECUTOR NOT RELEASED BY
APPOINTMENT, AND TO BE INCLUDED IN
INVENTORY.**

(d) The appointment of any person to be an executor shall in no case be deemed a release or extinguishment of any debt or demand which the testator may have had against him, but such debt shall be included in the inventory, and be subject to distribution like other personal estate.

NOTE.—This is Section 6 of the Act of February 24, 1834, 1 Purd. 1090, which corresponded to Section 7 of the Commissioners' Draft. They remarked that it was declaratory of the rule then prevailing, saying that formerly the appointment of a debtor as executor "was deemed at law a release or extinguishment of the debt."

**396. RENTS DUE TO TENANT FOR LIFE TO BE IN-
CLUDED IN INVENTORY.**

(e) The rents of any real estate accruing to any person as tenant for life of such estate, who had demised the same, for a term or time not fully expired at his decease, shall go to and be vested in the executors or administrators of such tenant, and the due proportion of such accruing rent, to be computed according to the time elapsed at the decease of such tenant, shall be included in the inventory of personal assets.

NOTE.—This is Section 7 of the Act of February 24, 1834, 1 Purd. 1091, which corresponded to Section 8 of the Commissioners' Draft and was derived from the Statute of 11 Geo. II, c. 19. The Commissioners remarked: "As the statute is already deemed a part of our law, there is nothing in the section which requires particular remark."

The only change made is to insert "as tenant," after "to any person."

397. ARREARAGES OF RENT-CHARGE OR OTHER RENT OR RESERVATION, TO BE INCLUDED IN INVENTORY.

(*f*) The arrearages of any rent-charge, or other rent or reservation in nature of a rent, due at the death of any tenant of such rent, in fee-simple or fee-tail, or for term of life or lives, shall go to and be vested in the executors or administrators of such tenant, and be included in the inventory, and appraised as personal assets.

NOTE.—This is Section 8 of the Act of February 24, 1834, 1 Purd. 1091, which corresponded to Section 9 of the Commissioners' Draft and was derived from the Statute of 32 Hen. VIII, c. 37.

The words "of such rent" have been inserted after "death of any tenant," and omitted after "life or lives."

398. ESTATES IN LAND FOR LIFE OF ANOTHER TO BE INCLUDED IN INVENTORY.

(*g*) All estates in lands or tenements, of which the decedent was seized at the time of his decease, for the life or lives of another person or persons, shall, unless such estates have been limited to the decedent and his heirs, go to the executors or administrators of such decedent, and be included in the inventory, and be subject to distribution in like manner as leases for terms of years.

NOTE.—This is Section 9 of the Act of February 24, 1834, 1 Purd. 1091, which corresponded to Section 10 of the Commissioners' Draft and was derived from the Statute of 29 Car. II, c. 3, Section 12.

399. AFTER-DISCOVERED PROPERTY TO BE INVENTORIED.

(*h*) Whenever personal property or assets of any kind, not contained in the inventory made and returned as aforesaid, shall afterwards come to the possession or knowledge of the executor or administrator, he shall make an inventory thereof and file the same in the office of the proper register, within thirty days from the time of the discovery thereof.

NOTE.—This is Section 3 of the Act of February 24, 1834, P. L. 73, 1 Purd. 1090, except that the period fixed by that section is four months.

The provision seems to have been new in the Act of 1834. The Commissioners of 1830 remarked: "This period (four months) may seem long, but the reason which prevailed with us in fixing a time was the inconvenience which might otherwise result in cases where property in small parcels may be discovered at successive intervals."

The Commissioners now recommend shortening the time to thirty days, the period allowed for filing the original inventory.

Section 11 of the Act of February 24, 1834, 1 Purd. 1091, which corresponded to Section 12 of the Commissioners' Draft, provides: "Whenever any executor or administrator shall sell, at public auction or vendue, any of the personal estate of the decedent, he shall, within thirty days thereafter, file in the office of the register having jurisdiction, a just and true account of the articles so sold, and the prices and purchasers thereof." The Commissioners reported that this practice was not infrequent in some parts of the state, but that, as an express direction, the provision was new.

This provision is understood to be obsolete and is therefore recommended for repeal.

400. APPRAISEMENT,—OATH OF APPRAISERS.

(*i*) Every executor or administrator shall cause a just appraisement to be made, by two or more appraisers, of the goods, chattels and credits of the decedent, of which an inventory is to be made, agreeably to the preceding clauses of this section; and the said appraisers shall be sworn or affirmed well and truly, and without prejudice or partiality, to value and appraise said goods, chattels and credits, and in all respects to perform their duty as appraisers, to the best of their skill and judgment.

NOTE.—This is Section 26 of the Act of March 15, 1832, P. L. 135, 1 Purd. 1091, altered by inserting the words "or more" in line 2.

401. NOTICE OF APPRAISEMENT,—RETURN.

(*j*) It shall be the duty of the executors and administrators, having given convenient notice to the appraisers of the decedent's estate, of a time and place for making the inventory and appraisement thereof, to produce or make known to them, in the presence of such of the persons interested in the estate as may attend, the whole of the personal estate of the decedent, which may have come to their possession or knowledge; and the inventory and appraisement thereof being finished, and certified by the appraisers, to file the same in the office of the proper register.

NOTE.—This is Section 2 of the Act of February 24, 1834, 1 Purd. 1091. It seems to have been new in that act. Some parts of its details were de-

rived from the Statute of 32 Hen. VIII, c. 5. The language has been changed so as to provide that the inventory and appraisement shall be filed instead of returned.

402. COMPENSATION OF APPRAISERS.

(k) The appraisers of the estate of a decedent shall be respectively entitled to receive therefrom, as compensation for their services in appraising the estate as aforesaid, such sum as the orphans' court having jurisdiction of the accounts of the executors or administrators shall deem proper, taking into consideration the labor, skill and responsibility involved.

NOTE.—This is a new section. The Commissioners' Draft of the Act of 1834 provided a compensation of two dollars a day. The act as passed (Section 10, 1 Purd. 1091) allowed only one dollar. This was amended by the Act of May 23, 1913, P. L. 344, so as to provide a compensation of two dollars and fifty cents a day. The Act of May 6, 1915, P. L. 267, 5 Purd. 5889, raised this to five dollars.

The Commissioners are of opinion that the compensation of appraisers should not be fixed by law at a definite sum for the reason that the labor and responsibility and skill required of the appraisers are not uniform. The estate may consist in part of raw materials or the partly finished products of a factory, stocks or bonds having no market value, stock in trade of a merchant, paintings or articles of a like nature, for the proper appraisement of which the services of an expert may be necessary. A compensation of one dollar or five dollars per day may in such cases be absurd. On the other hand, there are many cases where a compensation of \$2.50 would be entirely adequate, and \$5.00 too much. The Commissioners feel that the amount justly earned may be safely left to the court, as is the case with the commissions of an accountant.

403. WIDOW'S AND CHILDREN'S EXEMPTION,— CLAIM AND APPRAISEMENT OR SETTING APART; APPOINTMENT OF APPRAISERS BY COURT.

SECTION 12. (a) The widow, if any, or, if there be no widow or if she has forfeited her rights, then the children forming part of the family of any decedent dying, testate or intestate, within this commonwealth, or dying outside of this commonwealth, but whose estate is settled in this commonwealth, may retain or claim either real or personal property, or the proceeds of either real or personal property, belonging to said estate, to the value of five hundred dollars, and the property so retained or claimed shall not be sold, but suffered to remain for the use of the widow or children. It shall be the duty of the executor or administrator of

such decedent to have the said property, if personal, appraised and set apart to said widow or children by the appraisers appointed to appraise the other personal estate of the decedent, or, if real, then by two appraisers to be appointed by the orphans' court, who may be the same persons appointed to appraise the personal estate. If said five hundred dollars, or any part thereof, shall be claimed out of money or the proceeds of real or personal property belonging to the estate, it shall be the duty of the executor or administrator to set apart to said widow or children the amount so claimed out of said money or out of the proceeds of said real or personal property after he shall have sold the same. Should any or all of the appraisers of the other personal estate be unable to make the appraisement of personal property provided for by this section,, or should there be no such appraisers, the orphans' court of the proper county may appoint a properly qualified appraiser or appraisers to act in the place of said appraiser or appraisers of the other personal estate of the decedent.

NOTE.—This is founded on Section 5 of the Act of April 14, 1851, P. L. 612, 1 Purd. 1092, as amended by the Act of July 21, 1913, P. L. 877, 5 Purd. 5889. The provisos of that section as to liens for purchase money and the filing of the appraisement have been transferred to subsequent clauses. The provisions of the Act of May 6, 1909, P. L. 459, 5 Purd. 5889, as to decedents dying outside of the commonwealth, but whose estates are settled in the commonwealth, have been incorporated in the new section. It seems unnecessary to incorporate the provision of Section 1 of the Act of April 8, 1859, P. L. 425, 1 Purd. 1096, that the widow or children may elect to retain the exemption or any part thereof "out of any bank-notes, money, stocks, judgments or other indebtedness." The provision of that section that the appraisement shall be made by the appraisers of the other personal estate is covered by the amendment of 1913, which is included in the new draft. Since the Act of 1859 applies to the debtor's exemption under the Act of 1849, as well as to the widow's exemption, that act should not be generally repealed.

The reference in the Act of 1851 to the exemption law of 1849, has been omitted as unnecessary and confusing. The amount of the exemption has been increased to five hundred dollars.

The beginning of the section, which reads, "The widow or the children of any decedent," has been changed. The words "or the proceeds of either real or personal property when sold" have also been added to meet the decisions that the exemption cannot be claimed out of the proceeds of property. See *Finney's Appeal*, 113 Pa. 11; *Snyder's Estate*, 12 D. R. 536; *Thoman's Estate*, 16 York 154. A corresponding change has been made in the third sentence. Provision has been made for the case where only a part of the \$500 is claimed in money or proceeds of property.

Provisions for appointment by the court of appraisers of real estate and in cases where there are no appraisers of the other personal estate, or where they are unable to act, have been inserted.

The Act of 1851, together with the debtor's exemption Act of 1849, supplied Section 4 of the Act of February 24, 1834, P. L. 70, which is recommended for repeal.

The amount of the exemption was fixed at \$300 at a time when the purchasing power of money was far greater than it is at present. The Commissioners are of opinion that the sum to be set apart for the immediate necessities of the widow or children should be increased to \$500.

See form 76.

The new provisions as to widow's exemption inure to the benefit of the widow of one dying on June 7, 1917.

In so deciding, the court, per LAMORELLE, P. J., said:

"Two questions arise: First, whether the widow is entitled to \$300 under the Act of April 14, 1851, P. L. 612, and its supplements, or \$500 under Fiduciaries Act of June 7, 1917, P. L. 447; and, second, as to the real value of specific articles selected by her.

"It is stated in Endlich on Statutes (section 389) that the doctrine that the law knows no fraction of a day has in general been adhered to in this country both as to contract rights and statutes, though the rigidity of the rule has been much relaxed where the purposes of justice require the court to notice such fractions. In the present case the decedent died about five o'clock in the morning; that is admitted; but to attempt to inquire into what time of day the Governor signed the act known as Fiduciaries Act of 1917—and, for that matter, any other act—would result in hopeless confusion and contention. We are on safe ground when we follow the time-honored rule and hold that the Fiduciaries Act became effective on the first moment of June 7, 1917, the day it purports to have been signed."

Huber's Est., 27 Dist. 25.

The \$500 exemption allowed a widow out of her deceased husband's estate by the Act of June 7, 1917, P. L. 447 (Fiduciaries Act) does not vest in her at the death of her husband, but only when she elects to exercise her right by making a claim for it; and her personal representative cannot exercise her right for her after her death.

The right to this exemption of \$500 is a privilege to retain, and not an absolute transfer of part of the husband's estate.

In so holding the Court, per MAXWELL, P. J., said:

"It would, therefore, seem to us that the \$500 exemption allowed to widows under the Act of June 7, 1917, P. L. 447, is a personal privilege and benefit. Her right to have any exempted property depends entirely upon her claiming it. If she does not claim it, she never has it. If she neglects unduly to make her claim, she loses her right to do so. The right under the statute is a privilege to retain, and not an absolute transfer of part of the estate."

The widow in this case did not make any claim to this exemption prior to her death. Therefore, it would appear to us that her administrator is not entitled to claim \$500 exemption from the estate of her deceased hus-

band, for the reason that the widow made no claim to have this exemption of \$500. * * * The controlling distinction between the law relating to the \$500 exemption and the \$5,000 allowed to widows under the Act of 1917 is that the \$5,000 worth of property, real or personal, vests in the widow at the death of her husband, and does not require any action on her part to secure the same.

The \$500 exemption does not vest at the death of the husband, but only when she has elected to exercise the right, and this her executor or administrator cannot do for her after her death. *Desmond's Est.*, 28 Dist. 231, 36 Lanc. 217, 8 Leh. 255.

(Note. It would seem to be improper practice to join in one petition a prayer for the \$500 exemption and a claim to the \$5,000 allowance.—Editor.)

Where the plaintiff made claim to her widow's exemption of \$500.00 and personal property of deceased amounting to \$499.83 was duly appraised and set off to her; and of the property set off to her, items amounting to \$394.23 were personal property on the farm and in possession of the defendant who refused to deliver same to plaintiff, but retained them and had converted them to his own use and the appraisal of property set off to use plaintiff as widow of deceased was confirmed absolutely by the court and suit was therefore brought to recover the value of this personal property converted by defendant, to wit: \$394.23, the court, per ROSSITER, P. J., held: "The questions are *first*: Has the plaintiff the right to sue in this manner or to recover the balance due on account of her widow's exemption? *Second*: Is her right to exemption out of the personal property of her deceased husband superior to the rights of creditors? *Third*: Was the confirmation of the widow's appraisal an adjudication of her right to the property set aside by the appraisers?"

"By the Fiduciaries Act of 1917, P. L. 447, Section 12, it is provided that the widow * * * * May retain or claim either real or personal property or the proceeds of either real or personal property belonging to the estate to the value of \$500.00; that the property so retained or claimed shall not be sold, but suffered to remain for the use of the widow and children; that it shall be the duty of the executor or administrator to have said property appraised and set aside to the widow; that if the \$500.00 or any part thereof is claimed out of money or proceeds of real or personal property belonging to the estate, it shall be the duty of the executor or administrator to set apart for the widow or children the amount so claimed. The widow here, therefore, had a right to 'retain or claim' the property above mentioned. If she was in possession of the property she would undoubtedly 'retain' it, but being out of possession of the property, she 'claimed' the same and having 'claimed' the same, it was her 'duty' as administratrix to have it appraised and set aside and that appraisal confirmed and the defendant refusing to deliver the property, but converting it to his own use, (which is not denied) it was her 'duty' as administratrix to bring an action to the use of herself personally under rights given her under the act of assembly, so as to distinguish the action from one brought in the right of the estate, as in the first instance there can be no offset or counterclaim, while in the latter there may be. And *Neely v.*

McCormick, 25 Pa. 255, holds that such action may be in assumpsit. The first question, therefore, must be answered in the affirmative. The second question must also be answered in the affirmative. *Hill v. Hill*, 32 Pa. 511; *Compher v. Compher*, 25 Pa. 31; *Farrell's Estate*, 4 W. N. C. 383, 25 P. L. J. 56; *Potter's Estate*, 6 Super. Ct. 627. As to the third question we are inclined to answer that in the affirmative also, but as no case has been called to our attention in support thereof we do not pass upon it, but we do hold that the record showing that the defendant in this case, having been a party to those proceedings and filed exceptions thereto, which were April 1st, 1919, overruled, and the appraisal confirmed without any further exception to the court's action in that respect he is estopped from denying that the property set aside by that appraisal was the property of the decedent or subject to the widow's exemption." *Curtis v. Yost*, 2 Erie 6.

This section of the Fiduciaries Act, which increases the amount of the widow's exemption out of her deceased husband's estate from \$300 to \$500, makes no other change in Section 5 of the Act of April 16, 1851, P. L. 613, except in matters of procedure. While there is a verbal difference between the two acts, it is not enough to enlarge her right at the expense of the family relation. Hence, her claim is barred where, at the time of the husband's death, such relation did not exist by reason of the fact that she had voluntarily abandoned it.

Post's Est., 27 Dist. 748, 66 P. L. J. 761, 8 Leh. 115, 33 York 11, 19 Lanc. 62, 35 Lanc. 226, 36 Lanc. 8.

Wilful and malicious desertion of her husband, by a wife, will cause her to forfeit her right to widow's exemption. *Wenger's Est.*, 35 Lanc. Rev. 196, 27 Dist. 949.

The \$500 widow's exemption granted by the Act of June 7, 1917, P. L. 447, is not subject to the direct inheritance tax imposed by the Act of July 11, 1917, P. L. 832, providing that "All estates * * * passing from any person * * * either by will or under the intestate laws * * * are subject to the tax of \$2 on every hundred dollars of the clear value of such estate."

"Such exemption is a wife's inchoate property right in a husband's estate, which becomes complete when as his widow she sustains her claim for it. It is not subject to the tax imposed on the estate passing from a deceased husband." *Hildebrand's Est.*, 262 Pa. 112, 104 Atl. 866 (affirming 35 Lanc. 73, 66 Pitts. L. J. 176, 31 York 184. See also 35 Lanc. Rev. 303).

Where the owner of life insurance policies on his life, delivered the same to another without actual assignment, but with a clear expression of intent to make a gift thereof, with the condition that the donee shall pay the donor's debts and funeral expenses, and the policies thereafter, until the decease of the donor remained in the possession of the donee, who meanwhile paid a premium on each policy, it was held The donee was entitled to the proceeds of the policies and, there being no other assets of the decedent, the court refused to appoint appraisers to set aside the widow's exemption out of the donor's estate. *Becker's Est.*, 33 York 139.

Under Section 12 of the Fiduciaries Act of 1917, P. L. 471, providing that "children (where there is no widow) forming part of the family of any decedent * * * may retain either real or personal property * * *

belonging to said estate to the value of five hundred dollars," a daughter who lived with her father prior to and at the time of his death is entitled to the exemption regardless of her age or condition of dependence on the parent.

"This part of the section is founded on Section 5 of the Act of April 14, 1851, P. L. 612, which provides that 'the widow or the children of any decedent dying within this Commonwealth, testate or intestate, may retain either real or personal property belonging to said estate to the value of \$300 and the same shall not be sold, but suffered to remain for the use of the widow and family * * *.' It will be observed that the beginning of the new section has been changed and that the words 'then the children forming part of the family of any decedent dying' are new and were not in the former act. The reason for the change is very apparent, when it is remembered that under the former act there was room for judicial construction with respect to the persons entitled to the benefits allowed by the act. The courts, however, in construing the Act of 1851, invariably held that its purpose was the protection of the family, and that, therefore, if the widow and children were members of the family at the date of death, no other circumstance or condition could deprive them of the exemption.

"To harmonize the law and the views of the courts on the subject, the Legislature, upon the recommendation of the commission to codify and revise the law of decedents' estates, incorporated in Section 12 of the Act of 1917 the language describing 'children as forming part of the family of any decedent dying' and thus settled the question as to which children are entitled to the exemption.

"Under the Act of 1851, where the language was not so explicit and clear as it is in the Act of 1917, it was repeatedly held, that when the family relation was maintained by either the widow or children, the exemption was properly allowed. The age of the claimant was without significance, and the question of dependence had nothing to do with the operation of the Act. In *Lane's Est.*, 6 Dist. R. 618, decided by Judge STEWART, it was held that the criterion for recovery by an adult is not dependence, but the maintenance of family and residence with the testator. To the same effect is *Stevenson's Est.*, 23 Dist. R., 747, where it was decided that a married daughter is entitled to the exemption, even though she is independent of her father, if she maintains the family residence and relation with him. In the light of this construction of the Act of 1851, which appeared to be narrower in its scope than the present one, it can hardly be said that when the present act reads 'then the children forming part of the family of any decedent dying * * *,' it does not include all the children who con-on the parent." SCHAEFFER, P. J., in *Hornberger's Est.*, 13 Berks 183, 30 Dist. 907.

An appraisalment made in accordance with the provisions of Section 12 of the Fiduciaries Act of 1917 will not be set aside on exceptions unless it be shown that the appraisers lacked appreciation of their responsibility, that their labors are unworthy of consideration or that their findings are clearly erroneous. *Zerbe's Est.* 13 Berks 277.

404. LIENS FOR PURCHASE MONEY OF REAL ESTATE NOT TO BE AFFECTED.

(b) The provisions of this section allowing the widow or children of a decedent to retain real property, or the proceeds thereof, to the value of five hundred dollars shall not affect or impair any liens for the purchase money of such real property.

NOTE.—This is founded on the first proviso to Section 5 of the Act of 1851, as amended by the Act of July 21, 1913, P. L. 877, 5 Purd. 5889.

The words "or the proceeds thereof" have been inserted.

See Becker's Est., 33 York 139.

405 OATHS AND COMPENSATION OF APPRAISERS.

(c) Such appraisers shall be sworn or affirmed to appraise the property claimed by the widow or children of the decedent under the provisions of this act. The compensation of such appraisers for making an appraisal of personal property shall be included in the compensation allowed by the orphans' court for the performance of their duties as appraisers of the other personal estate of the decedent, and shall be paid out of the decedent's estate; and the compensation of appraisers appointed by the orphans' court as aforesaid shall be fixed by said court and shall also be paid out of the decedent's estate.

NOTE.—This is a new section, founded on Section 2 (b) of the new Intestate Act. (See 297 *supra*.)

The Commissioners are of opinion that the appraisal of real estate should be made by persons specially appointed rather than by the appraisers of the personal estate, who as a general rule are not familiar with real estate valuations; and that their compensation should properly be considered as an administration expense. The widow should receive her exemption without the deduction of such expenses or those of any necessary advertisements as provided in the next section.

See Becker's Est., 33 York 139.

406. ADVERTISEMENT OF NOTICE; CONFIRMATION AND FILING OF APPRAISEMENT; PAYMENT OF EXPENSES OF ADVERTISEMENT OR NOTICE.

(d) Upon due proof of compliance with such requirements as to notice, by advertisement or otherwise, as may be prescribed by the orphans' court of the proper county by general rule or otherwise, such court may enter a decree directing the payment of the

money, or confirming the appraisement of the personal or real estate chosen by said widow or children, and said appraisement, signed and certified by the appraisers and approved by the court, shall be filed among the records thereof: *Provided*, That all expenses of such advertisement or notice shall be paid out of the decedent's estate.

NOTE.—This is a new section, founded in part on the first proviso of Section 5 of the Act of 1851 as amended by the Act of July 21, 1913, P. L. 877, 5 Purd. 5889, and in part upon Section 2 (c) of the new Intestate Act. (See 298 *supra*). The provision as to payment of expenses out of the estate is new.

407. EXEMPTION TO MINOR CHILDREN,—DUTY OF EXECUTOR OR ADMINISTRATOR TO ACT.

(e) 1. In the case of any decedent leaving to survive him any minor child or children forming part of his family, and no widow, his administrator or executor, without request made to him by any one, shall have appraised and set aside, for the use and benefit of all such minor children of said decedent, property to the full value of five hundred dollars.

NOTE.—This is Section 1 of the Act of June 4, 1883, P. L. 74, 1 Purd. 1096, substituting "five hundred dollars" for "now allowed by law," etc., and "minor child or children forming part of his family" for "child or children under the age of fourteen years."

408. GUARDIAN OR EXECUTOR OR ADMINISTRATOR TO SELECT PROPERTY TO BE SET ASIDE.

2. The guardian of said child or children, and if there be none, the administrator or executor, with the appraisers, shall make selection of the property to be set aside, and in so doing, the said guardian, or the said administrator or executor, with the appraisers, shall be governed by the necessities of such child or children, under the circumstances of each case.

NOTE.—This is Section 2 of the Act of June 4, 1883, P. L. 74, 1 Purd. 1096, changing "appraiser" to "appraisers" and substituting "in so doing" for "in the same."

409. WHERE ESTATE DOES NOT EXCEED FIVE HUNDRED DOLLARS.

(f) When any decedent shall leave to survive him a widow or children and an estate not exceeding in value five hundred dollars it shall be lawful for such widow, or for such children by any next

friend or guardian, if to said children the right belongs, to petition the orphans' court of the proper county for the appointment of two appraisers, who shall appraise and set aside any property of said decedent, selected by such widow or by such next friend or guardian, in the same manner and with the same effect as if letters testamentary or of administration had issued and the appraisers been selected in the usual way. Such appraisers shall be sworn or affirmed, and shall receive for their services such compensation as shall be allowed by said court.

NOTE.—This is Section 3 of the Act of June 4, 1883, P. L. 74, 1 Purd. 1096, the language being slightly changed for the sake of clearness, especially so as to show that the widow need not file her petition by a next friend. The last sentence is new, and the amount is changed from three hundred to five hundred dollars.

**410. CLAIM OF EXEMPTION OUT OF REAL ESTATE
APPRAISED AT MORE THAN AMOUNT OF
CLAIM; APPRAISEMENT AND CONFIRMA-
TION; PAYMENT OF EXCESS; SALE ON
FAILURE TO PAY.**

(g) Whenever the widow or children of any decedent shall claim the sum of five hundred dollars in value, or any part thereof, under the provisions of this act, out of real estate left by said decedent, and the real estate appraised cannot be divided so as to set apart the amount so claimed in value without prejudice to or spoiling the whole or any parcel of said real estate, and the appraisers may have appraised or shall appraise and value the same at an amount equal to or exceeding the amount claimed by said widow or children out of said real estate, over and above the liens that are upon it, the orphans' court to which such application shall be made may confirm such appraisement and set apart, for the use of the widow or children, such real estate, subject to whatever liens may be against the same; conditioned, however, that the widow or children shall pay the amount of the valuation or appraisement, over and above the liens that may be against the said real estate, in excess of the amount claimed by said widow or children out of said real estate, within one year from the date of confirmation of such valuation. If the widow or children making such claim shall fail to make payment as above provided, the court, on application of any person interested, shall direct the executor or administrator to sell the said real estate, and the procedure in such case shall be the same as is provided

by law in cases of sales of real estate for the payment of debts of a decedent.

NOTE.—This is founded on Sections 1 and 2 of the Act of June 1, 1915, P. L. 682, 5 Purd. 5889, which repealed the Act of November 27, 1865, P. L. (1866) 1227, 1 Purd. 1096. The Act of 1915 has been modified so as to make the procedure uniform with that prescribed by Section 2 (d) of the new Intestate Act. (See 299 *supra*.)

411. TITLE TO VEST ON PAYMENT OF EXCESS; DISTRIBUTION OF PROCEEDS OF SALE.

(h) The real estate, if taken by the widow or children as aforesaid, shall vest in her or them and her or their heirs or assigns, subject to any liens upon it, on her or their paying the surplus over and above the amount claimed by her or them out of said real estate to the parties entitled thereto. Should the real estate be sold as provided in clause (g) of this section, then the sum of five hundred dollars or such part thereof as may be claimed out of the real estate shall be paid out of the purchase money to the widow or children, and the balance, after payment of costs and expenses, distributed to the heirs or other persons legally entitled thereto.

NOTE.—This is founded on Sections 3 and 4 of the Act of June 1, 1915, P. L. 682, 5 Purd. 5889, which repealed the Act of November 27, 1865, as above noted. The Act of 1915 has been modified so as to make the procedure uniform with that prescribed by Section 2 (e) of the new Intestate Act. (See 300 *supra*.)

Section 5 of the Act of 1915 provides: "All former appraisements, heretofore made as authorized hereby, are validated and made good and effectual." Section 6 of the Act of 1915 is merely a repealer.

412. WIDOW OR CHILDREN ENTITLED TO RENTS, INCOME, INTEREST AND DIVIDENDS FROM DEATH OF DECEDENT; DEDUCTION OF PROPORTIONATE PART UPON FAILURE TO PAY EXCESS VALUE OF REAL PROPERTY.

(i) In all cases where the appraisalment of property, real or personal or both, is confirmed and the property set apart to the widow or children under the provisions of this section, said widow or children shall be entitled to receive for her or their own use the net rents, income, interest and dividends thereof from the date of the death of such decedent: *Provided*, That where the property so set apart shall consist of real estate appraised at an amount exceeding the amount claimed by said widow or children out of said

real estate, over and above the liens that are upon it, and the widow or children shall fail to pay the excess over the amount so claimed as provided in clause (g) of this section, and the property shall thereupon be sold, there shall be deducted from the sum to be paid to said widow or children out of the proceeds of such sale a proportionate part of the rents and income of such real estate received by such widow or children.

NOTE.—This is a new clause, modeled upon Section 2 (f) of the new Intestate Act. (See 301 *supra*.) It will be of less frequent application under the present act, but seems to be proper.

413. PROCEDURE WHERE REAL ESTATE LIES IN ANOTHER COUNTY OR IS DIVIDED BY A COUNTY LINE.

(j) Whenever the widow or children of any decedent shall claim the said five hundred dollars in value, or any part thereof, under the provisions of this section, out of the real estate left by the said decedent and lying in any county of this state other than the county wherein said decedent shall be domiciled at the time of his death, and the orphans' court having jurisdiction of the accounts of the personal representatives of said decedent shall be satisfied, upon petition filed, of the propriety of allowing such claim, it shall be lawful for such court to make a decree authorizing such widow or children to file her or their petition in the orphans' court of the county wherein such real estate may lie, or, in a case where the real estate is divided by a county line, in the county where the mansion house may be situated, or, if there be no mansion house, in the county where the principal improvements may be, or, if there be no improvements, in either county, praying for the appointment of two appraisers. Upon the filing of such petition duly verified, it shall be the duty of the latter court to appoint such appraisers, who shall be duly sworn or affirmed, and shall appraise said real estate, and shall be compensated as directed by said court; and proceedings shall thereupon be had in said court and subject to its supervision and control, in the same manner and with the same effect as is provided in clauses (g), (h) and (i) of this section. In every such case a certified copy of the decree confirming such appraisal, or of such decree of sale and the confirmation thereof, as the case may be, shall forthwith be filed with the clerk of the orphans' court having jurisdiction of the accounts of the personal representatives of the said dece-

dent. The latter court shall in all cases have exclusive jurisdiction of the distribution of the surplus paid by such widow or children, or of the proceeds of such sale, after the payment of costs and expenses, as the case may be.

NOTE.—This is a new clause, modeled on Section 2 (g) of the new Intestate Act. (See 302 *supra*.) The clause seems necessary, although the case may not arise frequently.

414. RECORDING AND REGISTRY OF DECREE CONFIRMING APPRAISEMENT OF REAL ESTATE.

(k) In all cases where a decree shall be entered by any orphans' court confirming an appraisement of real estate and setting apart the same for the use of the widow or children, a certified copy of such decree shall be recorded in the office of the recorder of deeds of each county where such real estate shall lie, in the deed book, and shall be indexed by the recorder in the grantors' index under the name of the decedent, and in the grantees' index under the name or names of the widow or children, and shall be registered in the survey bureau, or with the proper authorities empowered by law to keep a register of real estate, if any there be, in each of said counties. The charges for recording and registering shall be the same as are provided by law for similar services, and shall be paid out of the estate of the decedent.

NOTE.—This is a new clause, modeled on Section 2 (h) of the new Intestate Act. (See 303 *supra*.)

415. PAYMENT OF DEBT OF DECEDENT,—ORDER OF PAYMENT.

SECTION 13. (a) All debts owing by any person within this state, at the time of his decease, shall be paid by his executors or administrators, so far as they have assets, in the manner and order following, viz.: 1. Funeral expenses, medicine furnished and medical attendance given during the last illness of the decedent, and servants' wages, not exceeding one year; 2. Rents, not exceeding one year; 3. All other debts, without regard to the quality of the same, except debts due to the commonwealth, which shall be last paid.

NOTE.—This is Sec. 21 of the Act of Feb. 24, 1834, (P. L. 76) 1 Purd. 1103 (Section 22 of the Commissioners' Draft), which was founded on Section 14 of the Act of April 19, 1794, 3 Sm. L. 143.

"The history of this legislation, as shown in the Act of April 19, 1794, 3 Sm. L. 143, the second report of the Commission of 1830 to revise the Civil Code, pages 39 and 52, and the Act of 1834, above referred to, shows that the words 'without regard to the quality of the same' were intended to obliterate the old distinctions which gave priority to judgments, recognizances, bonds and specialties, and do not apply to cases where the order of preference may depend upon the special incidents of the contract between the parties." *GEST, J., in Cockran's Est., 28 Dist. 654.*

A liquor license is not in the usual sense an asset for the payment of debt of the deceased licensee.

Where the widow of a deceased owner of a liquor license contracted with one of the creditors to sell the license, good will and unexpired leasehold, with the personal property on the premises, at public sale, and gave the creditor forty per cent. of the net proceeds, in consideration of that creditor's staying its execution, which it had levied on the property in the decedent's lifetime, the contract is binding on the creditors, even if the estate is insolvent. The landlord, in such a case, is not entitled to a preference as to his claim for rent due at the decedent's death out of the proceeds of sale of the good will, license and leasehold under the Acts of February 24, 1834, Section 21, P. L. 70, and the Fiduciaries Act of June 7, 1917, P. L. 447. *Tschopp's Est., 27 Dist. 103, aff'd in 71 Super. 434.*

Funeral expenses, being regarded as equivalent to a debt of the decedent should be deducted in computing inheritance tax. *Smith's (Jennie) Est., 49 Pa., C. C. 453, 29 Dist. 917.*

416. PAYMENT NOT TO BE COMPELLED WITHIN SIX MONTHS.

(b) No executor or administrator shall be compelled to pay any debts of the decedent, except such as are by law preferred in the order of payments to rents, until six months be fully elapsed from the granting of the administration of the estate.

NOTE.—This is Section 22 of the Act of 1834, 1 Purd. 1105, which was new in that act. The only change now made is to reduce the period from one year to six months.

Section 23 of the Act of 1834, 1 Purd. 1106, which was new in that act, reads: "Whenever the laws of the place in which was the decedent's domicile at the time of his death, contain any provisions whereby a preference may be given in the payment of debts, due to the citizens or residents thereof, as such, over the citizens or residents of this state, the executor or administrator shall, in the disposition of such of the assets as may come into his hands, observe the like rules of preference in favor of the citizens or residents of this Commonwealth over the citizens or residents of such place, in the same manner as if such rules were hereby expressly enacted."

It is recommended that this reciprocity provision be repealed.

**417. RENTS OF REAL ESTATE TO BE ASSETS FOR
PAYMENT OF DEBTS WHEN PERSONAL ES-
TATE INSUFFICIENT; COLLECTION BY EX-
ECUTOR OR ADMINISTRATOR.**

SECTION 14. Rents of real estate accruing after the death of the owner of such real estate, who shall die on or after the day on which this act shall go into effect, shall be assets for the payment of debts of such decedent whenever the personal estate shall be insufficient therefor. Whenever the personal estate of such decedent shall appear to be probably insufficient for the payment of debts, the orphans' court having jurisdiction of the accounts of the executor or administrator shall, upon application of any creditor of the decedent, or upon application of the executor or administrator, or of any other person interested, authorize and direct the executor or administrator to collect such rents for such period as the court shall fix. In such case, the executor or administrator shall have power to collect such rents by action at law, distress, or otherwise, as the decedent, in his lifetime, might have done as to rents of such real estate; and rents so collected shall be accounted for by the executor or administrator in his account of the personal estate of the decedent.

NOTE.—This is a new section. Land in Pennsylvania has been an asset for the payment of debts, at least since 1693; Laws made at Philadelphia, c. 14; but until the land has been brought into administration either by the provisions of the will or by process of law, it belongs to the heir or devisee, who is consequently entitled to the rents; and even where the estate is insolvent an executor or administrator, and consequently the creditors, have no right to the interim rents: *Fross's Appeal*, 105 Pa. 258. This does not appear to be just, for the devisee or heir should have no right to anything until the debts are paid; and the Commissioners recommend this change in the law in order that this inequality may be corrected.

Furthermore the application of the rents during the period of administration to the payment of debts may in some cases obviate the necessity for a sale and perhaps a sacrifice of the real estate.

See, generally, *Miller's Est.*, 264 Pa. 310; 107 Atl. 614 *Cullen's Est.*, 16 Sch. 278.

Under this section of the Fiduciaries Act executors are entitled to collect rents and to possession of decedent's real estate as against the residuary devisee, it appearing that the personal estate of the decedent was not sufficient to pay decedent's debts, and a petition on behalf of the devisee to vacate an order made without notice authorizing the executors to collect the rents of the real estate was dismissed.

While the Fiduciaries Act of June 7, 1917, declares that the rents of a decedent's real estate shall be assets for the payment of debts and that the

court shall authorize the executor to collect them, it seems clear that this power should be granted when *prima facie* facts appear in a petition covering the provisions of the Act. But the proper practice is that notice should first be given to all parties interested.

The power "to collect by action at law, distress or otherwise," as provided by the Fiduciaries Act of June 7, 1917, is not limited to rents on outstanding leases. The act does not make mention of outstanding leases; it concerns itself with all rents, meaning those that are based on leases, etc., and those that should be obtained out of the profits which the lands can produce, so that executors under this statute have the power to make and renew leases. *Reel's Est.*, 65 P. L. J. 689 affirmed in 263 Pa. 248, 106 Atl. 227.

"This is new and very wise legislation, for before its passage the rents accruing from the real estate of a decedent owner went to his heirs and devisees from the time of his death: *Haslage v. Krugh*, 25 Pa. 97; *Fross's Appeal*, 105 Pa. 258; and the heir or devisee of an insolvent decedent took such rents at the expense of the creditors of the estate. To remedy this long existing injustice by making rents, as well as the land out of which they issue, assets for the payment of the debts of a decedent, the fourteenth Section of the Act of 1917 was passed." * * *

"Rents which accrued after the death of *Almatia L. Reel* on leases executed by her undoubtedly became assets for the payment of her debts under the Act of 1917, and as this is conceded, the real and only question for determination is as to the authority of the executors to collect rents, as assets for the payment of her debts, from real estate which was not under lease at the time of her death. As has been observed, the manifest purpose of the Act of 1917 is the correction of a long standing wrong to creditors of deceased owners of real estate, and to give effect to that purpose, the act is to be given a liberal construction: *Quinn v. Fidelity Beneficial Association*, 100 Pa. 382; *Poor District of Huntingdon Twp. v. Poor District of New Columbus Boro.*, 109 Pa. 579; *Commonwealth v. Shaleen*, 215 Pa. 595; *Jones v. Beale*, 217 Pa. 182. The cardinal rule in construing any statute is to ascertain the legislative intent, that effect may be given to it. No strained construction need be put upon the fourteenth Section of the Act of 1917 to discover the legislative intent in passing it. A reasonable reading of its words makes that intent most clear. It is that rents of real estate accruing after the death of the owner shall be assets for the payment of the debts of the decedent when the personal estate shall be insufficient therefor. Rents generally—not merely rents which may accrue after the death of decedent on leases executed by him or her—are made assets for the payment of debts. And what are rents? They are certain profits—not necessarily money—issuing yearly out of land and tenements corporeal: 2 *Blackstone* 41. Applying this to the Fourteenth Section of the Act of 1917, in which nothing is said about leases, what is an executor or administrator authorized to collect as assets for the payment of debts of his decedent under the direction of the Court? Clearly whatever yearly profits can be realized from the real estate of his decedent, if the personal estate is insufficient for the payment of debts, whether such profits are from a lease made by the decedent or by his personal repre-

sentative under the authority of the Court. In other words, the legislative intent, as clear by implication as if expressed in words, is that neither heir nor devisee shall profit from the real estate of a decedent when it or the rents issuing from it are needed for the payment of debts."

"Under the strained construction we are asked to place upon the act its purpose would be defeated whenever there would be no existing lease of a decedent leaving personal property insufficient for the payment of debts. In refusing to so construe the act, the learned judge below, speaking for the court, aptly and properly said of its 14th section: 'If its language means only rents on leases made by a decedent in his lifetime, then an insolvent decedent could limit all leases made by him to his lifetime, permit his heir or devisee to take a large asset of his estate, to the complete detriment of his creditors, pending a sale of his land. If it was not intended to make rents proper assets for payment of debts, in absence of leases, then productive real estate can lie idle without benefit to creditors. If it was not intended that executors should take possession and secure rents pending sale, then the provision is a futile one.' Nothing more need be added in disposing of this appeal."

Per BROWN, C. J., in *Reel's Est.*, 263 Pa. 248, 106 Alt. 227, affirming 65 P. L. J. 689.

The Fiduciaries Act of June 7, 1917, Section 14, P. L. 447 makes rents accruing after the death of the owner of real estate assets for payment of his debts, when the personal estate is insufficient, and provides for the collection of the same by the personal representatives. But the lien of the unsecured debts on a decedent's real estate is lost, unless, within a period of one year after the decease of the debtor, an action for the recovery be brought against his personal representatives. Therefore, if a creditor has failed to commence suit within one year, the executor or administrator has no authority afterward to apply the rents from the real estate to the payment of his claim. *Kearney's Est.*, 30 Dist. 75.

"It was no omission not to have included in the petition for the order to sell the real estate an averment that with the rents the personal estate is insufficient to pay the debts. It is only by virtue of the Fiduciaries Act of 1917 (Section 14), that rents accruing after the death of the owner of real estate can become assets for the payment of debts; and it applies only to the debts of such as died on or after the date it became effective, which was about eight years after the death of Abraham Bowman."

Per SMITH, P. J., in *Bowman's Est.*, 47 Pa. C. C. 405, 28 Dist. 766, 67 P. L. J. 321, 36 Lanc. 121, 33 York 2.

418. LIEN OF DEBTS OF DECEDENT; LIEN LIMITED TO ONE YEAR UNLESS ACTION BROUGHT, INDEXED, AND DULY PROSECUTED TO JUDGMENT.

SECTION 15. (a) No debts of a decedent, including the cost of settlement of the estate, and the funeral expenses of the decedent, except as provided in clauses (b), (g) and (h) hereof, shall re-

main a lien on the real estate of such decedent longer than one year after the decease of such debtor, unless within said period an action for the recovery thereof be brought against the executor or administrator of such decedent, and such action shall be indexed, within said period, against the decedent and such executor or administrator, in the judgment index in the county in which such action is brought, and also in the county in which the real estate sought to be charged is situate, and be duly prosecuted to judgment; and then to be a lien only for the period of five years unless the same be revived by writ of scire facias against the decedent, his heirs, executors, or administrators, and the devisee, alienee, or owner of the land sought to be charged, in the manner now provided in the case of the revival of judgments.

The plaintiff may, at his election, join such surviving spouse and heirs, and the devisee, alienee, or owner of the land in such original action, in which event such action shall be indexed as aforesaid against all defendants so joined. *In any action brought under this section, if the plaintiff obtains a verdict or a judgment or an award by an auditor, or, before obtaining a verdict or a judgment, obtains, by the orphans' court in his favor, or otherwise obtains an allowance of his claim, he shall also be allowed costs of suits, without regard to the amount of his claim, and without the filing of an affidavit that the debt due or damages exceeds the sum of one hundred dollars. If an action for the recovery of a debt be brought as aforesaid, it shall be deemed to have been duly prosecuted to judgment if award in favor of the plaintiff be made by an auditor or the orphans' court, or if the claim be included in a schedule of distribution and the latter be confirmed by the court.*¹

NOTE.—This is the first part of Section 1 of the Act of May 3, 1909, P. L. 386, 5 Purd. 5891, changed by reducing the period of the lien to one year instead of two, and by omitting, for the sake of clearness, the provisions as to debts not payable within the year, which are embodied in clause (b) of this section.

The Act of 1909 apparently repealed by implication Section 1 of the Act of June 14, 1901, P. L. 562, 1 Purd. 1106, which amended Section 1 of the Act of June 8, 1893, P. L. 392. The Act of 1893 supplied Section 24 of the Act of 1834, which was derived from Section 4 of the Act of April 4, 1797, 3 Sm. L. 296.

Section 5 of the Act of 1909, as amended by the Act of May 14, 1915, P. L. 475, 5 Purd. 5892, expressly repeals the Act of June 18, 1895, P. L. 197, 1 Purd. 1108, and Section 25 of the Act of February 24, 1834.

Before the Act of 1797, the lien was of indefinite duration. That act reduced it to seven years, the Act of 1834 to five years, and the Act of

1893 to two years. It is now recommended that the period be reduced to one year.

The words "and the funeral expenses of the decedent" have been inserted in order to settle the question whether such expenses are subject to the limitation of lien.

The last sentence is new, but declaratory of the law as laid down in the decisions.

There seems to be no reason why the lien should continue longer than one year. At present the personal estate of a decedent may be distributed at the expiration of one year, and if the procedure prescribed by law be followed, creditors lose their grasp, which corresponds to a lien, upon the fund distributed. It is perhaps proper that the lien should continue for a somewhat longer period of time as to real estate, but inasmuch as, according to the act recommended, the time allowed for the settlement of the personal estate is shortened to six months, the Commissioners recommend a corresponding abbreviation of the lien as to real estate. It will, of course, not be forgotten that a creditor may by appropriate proceedings under this section continue his lien for a longer period.

¹The portion in *Italics* added by the Amendment of June 7, 1919 (P. L. 412).

Funeral expenses were held a debt under the section in *Smith's Est.*, 49 Pa. C. C. 453, 29 Dist. 917.

An administrator is not obliged to pay and it is no part of his duty as administrator to pay from his own funds the debts of the decedent whom he represents, but having paid them his claim for reimbursement therefor becomes that of an unsecured creditor and is within the statute of limitations.

The Fiduciaries Act of 1917 repeals absolutely both the Acts of 1901, P. L. 562, and of 1909, P. L. 386, relating to debts of decedents, and being retroactive, the costs of administration accrued prior to the passage of this act are collectible from the real estate and will be allowed from a fund in the hands of a trustee in partition.

Where the heirs of a decedent agreed under seal that a debt owing by decedent should be paid "out of said estate upon a final settlement thereof," this agreement would include the real estate as well as the personalty, would toll the statute and the claim will be allowed at the distribution of a fund arising from partition, but without interest, the principal being payable at the final settlement of the estate. *Olson's Est.*, 65 P. L. J. 571, 34 Lanc. 397.

Clause (a) of Section 15 of the Fiduciaries Act of 1917 (June 7, 1917, P. L. 447) provided that no debts, etc., of a decedent shall remain a lien on his real estate longer than one year after the decease of such debtor unless within said period an action for the recovery thereof be brought against the executor or administrator of such decedent. The question involved in this appeal is whether Clause (c) of said section, which declares the foregoing provision to be retroactive is unconstitutional. There can be no doubt of the intention of the legislature to make it retroactive * * *

Here the purpose is unmistakable; it is the power of the legislature to enact such a provision which is questioned.

The appellant contends that it is violative of Article I, Section 17, of the Constitution, which provides; "No ex post facto law, nor any law impairing the obligation of contracts * * * shall be passed." The term, ex post facto, as used in the Constitution of the United States and of this State is limited to penal statutes, and may be defined as one which imposes a punishment for an act which was not punishable when it was committed, imposes additional punishment or changes the rules of evidence by which less or different testimony is sufficient to convict; 8 Cyc. 1027; *Calder v. Bull*, 3 Dallas, 386 p. 390. Clearly the Fiduciaries Act of 1917 is not an ex post facto law in respect to Clause (c) aforesaid. Does it impair the obligation of contracts? If not, it is not prohibited by the Constitution. *Gault's App.* 33 Pa. 94.

It is not contended that the decedent entered into any contract with the appellant that his debt to her should be a lien on his real estate for any specified period after his death. She lent him one thousand dollars on July 19, 1915, and took his simple promissory note therefor dated the same day and payable one year thereafter. The fact that upon his death this debt became a lien on his real estate, was due to the provisions of an early statute of Pennsylvania, which thus gave her a means of recovering the debt owing her by said decedent; but it transferred to her no right of property; a lien is not a title to a thing, but a right to present a claim against it and demand payment out of it. *Taylor v. Carryl*, 24 Pa. 259, p. 266 * * *

On full consideration, we are of opinion that the clause of the Act of 1917 in question did not impair the obligation of any contract between the appellant and the decedent, and is, therefore, constitutional. The act did not take away from the plaintiff at the time of its approval any vested right; she was not deprived of her right to pursue her remedy; on the contrary it was specifically preserved; the legislature simply limited the time within which she could assert her claim against the decedent's real estate, but did not deprive her of the claim itself. There can be no question as to the reasonableness of the time allowed her, for she was given the same time to bring her suit that is granted to creditors of persons dying since the passage of the act. For a whole year thereafter the appellant might have preserved her claim and the right to enforce payment out of the decedent's real estate, but having done nothing during that period she is barred by her own inaction from looking to that fund or security for payment of her debt. The outcome is unfortunate but it is the result of her sleeping on her rights.

The præcipe for the indexing of the action in the judgment index, in accordance with the provisions of Clause (d) of the same section, showed that the decedent had died over a year before suit was brought. It was, therefore, irregular on its face and furnished no legal warrant for the entry in the judgment index, and the court below was justified in ordering such entry to be stricken from the records.

The appellant however had the right to bring her action against the executor of the decedent, and to prosecute the same to judgment, irrespective

of the Act of 1917. Any judgment obtained therein would not be a lien on the decedent's real estate, but would be entitled to share in the distribution of any personalty that might come into the executor's hands. The court, therefore, went too far in ordering the action to be dismissed. The mistake was, no doubt, inadvertent and would have been corrected if the matter had been called to the court's attention. We know of no warrant, however, for joining the deceased person as a co-defendant with the executor in such action. Even under the Act of 1917, the action is to be brought against the executor or administrator, but indexed against the decedent, and his legal representatives. We will consider the caption of the suit to have been so amended." *KELLER, J.*, in *Myers v. Lohr*, 72 Super. 472, affirming 66 P. L. J. 665, 8 Leh. 119, 19 Lack. 287. See also *Kirk v. Van Horn*, 265 Pa. 549, 109 Atl. 522; *Olson's Est.*, 65 P. L. J. 571, 34 Lanc. 397; *Scherrer's Est.*, 7 West. 109.

Under Section 15 (a) of the Fiduciaries Act of June 7, 1917, P. L. 447, which limits the liability of a decedent's real estate for his debts to one year, the word "debts" includes the costs of settling the estate and the funeral expenses.

The retroactive character of this section does not render it unconstitutional, for no contractual obligation is thereby impaired.

Although the statute shortens the period of limitation of actions, it gives a reasonable time for the commencement of a suit, and is, therefore, constitutional. * * * The amount due the widow for counsel fee, commissions and funeral expenses was a lien on the real estate as of June 7, 1917, when the Fiduciaries Act was approved. Under the old law these items were an indefinite lien, but the Fiduciaries Act of June 7, 1917, P. L. 447, changed their status by including them as "debts" of a decedent, and limiting the lien of decedent's debts to the period of one year. A year having now elapsed since June 7, 1917, the claim for these items lost its lien, and the real estate ceased to be liable. *Cassady's Est.*, 28 Dist. 37, 32 York 155.

Under Section 15 of the Fiduciaries Act of June 7, 1917, P. L. 447, common debts, the costs of settling the estate, and the funeral expenses of a decedent shall not remain a lien on the real estate of such decedent longer than one year after the decease of such debtor, unless within said period an action for the recovery thereof be brought against the executor or administrator of such decedent, and such action be indexed, within said period, against the decedent, and such executor or administrator in the judgment index in the county in which such action is brought, and also in the county in which such real estate sought to be charged is situate, and be duly prosecuted to judgment; however, in the case of a decedent who died before the passage of said act, the lien of such debts, was preserved by bringing and indexing such action within one year after the passage of the act. *Gibb's Est.*, 30 Dist. 128, 34 York 29.

The Fiduciaries Act of June 7, 1917, Section 14, P. L. 447, makes rents accruing after the death of the owner of real estate assets for payment of his debts, when the personal estate is insufficient and provides for the collection of the same by the personal representatives. But the lien of the unsecured debts on a decedent's real estate is lost unless, within a period

of one year after the decease of the debtor, an action for the recovery be brought against his personal representatives. Therefore, if a creditor has failed to commence suit within one year, the executor or administrator has no authority afterwards to apply the rents from the real estate to the payment of his claim. *Kearney's Est.*, 30 Dist. 75.

Testator provided that his residuary estate, real, personal and mixed, was to be sold by his executors and the proceeds divided in varying proportions among certain legatees. More than a year after his death some of his real estate was sold by the executors and the proceeds brought into their account, which showed the estate was insolvent: *Held*, That debts for which no action had been brought within one year from the date of the death, as required by the Fiduciaries Act of June 7, 1917, P. L. 447, were entitled to share in the proceeds of the real estate so sold pro rata with those for which suit had been brought on the ground that there had been a conversion of the real estate. *Hoch's Est.*, 48 Pa. C. C. 149, 28 Dist. 416, 68 P. L. J. 207, 37 Lanc. 98.

419. DEBTS NOT DUE WITHIN ONE YEAR; PROCEDURE TO ACQUIRE AND CONTINUE LIEN.

(b) No bond, covenant, debt or demand which is not payable within the said period of one year after the decease of the debtor, shall remain a lien upon the real estate of such decedent longer than one year after his death, unless, within said period after his decease, a copy or particular written statement thereof be filed in the office of the prothonotary of the county where the real estate to be charged is situate, and be indexed against the decedent and the executor or administrator in the judgment index in the county where the executor or administrator resides and also in the county in which the real estate sought to be charged is situate; and then to be a lien only for the period of one year after the said bond, covenant, debt, or demand becomes due, unless within said period of one year an action for the recovery thereof be brought, indexed and duly prosecuted to judgment as provided in clause (a) of this section. *Provided, That when such bond, covenant, debt, or demand does not become due within five years from the date of the death of such decedent, a renewal of the entry of such action upon the judgment index as aforesaid, shall, upon the order of the plaintiff or his attorney duly filed in said prothonotary's office, be noted on said index within every recurring period of five years, otherwise the same shall cease to be a lien.*¹

NOTE.—This is founded upon those provisions of Section 1 of the Act of May 3, 1909, omitted from Clause (a).

¹The portion in italics added by Amendment of May 2, 1919, (P. L. 104).

The petitioner's claim to the rents from the real estate, based upon the Fiduciaries Act of June 7, 1917, P. L. 447, under the provisions of Section 14, which makes rents accruing after the death of the owner of such real estate assets for payment of debts when the personal estate is insufficient and for the collection of the same by the personal representatives, does not come within the exception provided by Clause (b) as amended by the Act of May 2, 1919, P. L. 104. Kearney's Est., 30 Dist. 75.

420. PROVISIONS OF CLAUSE (A) TO BE RETROACTIVE; SAVING CLAUSE.

(c) The provisions of clause (a) of this section shall be retroactive: *Provided, however,* That in case of any bond, covenant, debt, or demand that would be sooner barred, an action for the recovery thereof may be commenced within one year after the passage of this act, in manner as provided in clause (a) of this section.

NOTE.—This is Section 2 of the Act of June 14, 1901, P. L. 562, 1 Purd. 1108, modified in phraseology.

Where a decedent died May 23rd, 1916, the unsecured debts will not expire or be barred as to lien against the real estate before the 7th of June, 1918, under the provisions of Section 15 (a) and (c) of the Act of 7 June, 1917, P. L. 447.

"In the present case the decedent died on the 23rd day of May, 1916. Under the old statute, the time would expire on the 23rd day of May, 1918. Under the new statute, death the 23rd day of May, 1916, one year from that time was the 23rd day of May, 1917.

"Thus it appears that, under the new statute, the time would have expired, if the retroactive clause would have been applied, without the provision in it, on the 23rd day of May, 1917, and it would, therefore, have been 'sooner barred' than the date of the act, and the time given by the express language of the act for the commencement of actions would be for one year after the passage to wit: the 7th day of June, 1918, being the date of expiration. We conclude, therefore, that these debts, so far as unsecured, would continue liens not only to the 23rd day of May, 1918, which would be ample time to make a sale in this case, but even the 7th day of June, 1918, the date of the act plus one year.

"The only estates which this act affects, about which there can be any doubt, are those of persons dying between the 7th day of June, 1915, and the 7th day of June, 1917, the date of adoption of the Fiduciaries Act. As to all persons dying on the 7th day of June, 1915, unsecured claims against their estates would be barred at the time of the new act, and as to persons dying after the 7th day of June, 1917, claimants have only one year in which to bring suit. What 'retroactive,' therefore, means is that the Act of the 7th day of June, 1917, shall affect the estates of persons dying between the 7th day of June, 1915, and the 7th day of June, 1917. But the proviso in the act saves all claims which would be barred in less

than a year from the date of its passage, or, in other words, what the act means is that every unsecured creditor of any decedent dying on and after the 7th day of June, 1915, has until the 7th day of June, 1918, to bring suit. Per COPELAND, P. J. in Scherrer's Est., 7 West. 109.

See also Olson's Est., 65 P. L. J. 571, 34 Lanc. 397; Gibb's Est., 30 Dist. 128, 34 York 29; Cassady's Est., 28 Dist. 37, 32 York 155.

The Fiduciaries Act of June 7, 1917, P. L. 447, is not unconstitutional because it is retroactive, so that a suit not brought against the estate of a decedent, who had died prior to its enactment, within one year of decedent's death, will not be a lien against decedent's real estate. Such lien would have been valid had suit been entered within one year after June 7, 1917.

Myers v. Lohr, 66 P. L. J. 665, 19 Lack. 287, 8 Leh. 119, affirmed in 72 Super. 472.

421. INDEXING BY PROTHONOTARY; FILING CERTIFIED COPY OF PRÆCIPE IN OTHER COUNTIES.

(d) It shall be the duty of the prothonotary of any county of this commonwealth, when an action is brought or statement is filed as aforesaid in his office, upon præcipe of the plaintiff or his attorney, to index the same against the decedent, his executor or administrator, and any other defendants therein, in the judgment index, as other liens are indexed, and to certify the same as liens in any certificate of liens that he may be required to make by virtue of his office. The prothonotary of any court in which said action may be brought, shall, upon request, furnish a copy of such præcipe, which, when duly certified, under the seal of the court, may be filed in any other county of this commonwealth in which the real estate sought to be charged with the debts of such decedent may be situate, and when so filed shall be indexed, against the parties named therein, upon the judgment index in such county.

NOTE.—This is the latter part of Section 1 of the Act of May 3, 1909, P. L. 386, 5 Purd. 5891. The last part of the first sentence has been added to cover the provisions of the Act of June 15, 1871, P. L. 387, 4 Purd. 4060, in so far as they relate to this subject.

See Myers v. Lohr, 72 Super. 472, affirming 66 P. L. J. 665, 19 Lack. 28, 8 Leh. 119.

422. EXECUTIONS ON JUDGMENTS OBTAINED AGAINST EXECUTORS OR ADMINISTRATORS; SCIRE FACIAS TO SURVIVING SPOUSE, HEIRS, ETC.

(e) No execution for the levy or sale of any real estate of any decedent shall be issued upon any judgment obtained in an action

against his personal representatives under the foregoing clauses of this section unless the surviving spouse and heirs and the devisee, alienee or owner of the land sought to be charged, and the guardians of such as are minors shall have been made parties to such action, or, if they shall not have been so made parties, unless they shall be warned by a writ of scire facias issued against them on such judgment. If any of the parties reside outside of the county, the court may, by general rule or special order, direct service of such writ of scire facias by publication or otherwise.

NOTE.—This is a new clause, inserted to take the place of Section 34 of the Act of 1834, 1 Purd. 1113, now recommended for repeal, and declaratory of the law as laid down in the decisions from *Murphy's Appeal*, 8 W. & S. 165, *Atherton v. Atherton*, 2 Pa. 112, and *Walthaur v. Gossar*, 32 Pa. 259, 261, where Section 34 was termed "a bungling enactment," down to *McCormick v. Skelly*, 201 Pa. 184.

423. JUDGMENTS NOT LIENS AT DEATH TO BE TREATED AS DEBTS NOT OF RECORD; METHOD OF CONTINUING LIEN.

(f) Judgments which were not liens on the real estate of the decedent by entry or revival, by due process of law, within five years prior to the death of such decedent, shall not be revived as liens of record against real estate by the death of the defendant, but shall rank and be treated simply as ordinary debts not of record, and the lien thereof shall be continued after the expiration of one year from the decease of such debtor only by writ of scire facias to revive, issued within one year after the death of the decedent, indexed as provided in clauses (a) and (d) of this section, and duly prosecuted to judgment; and then to be a lien only for the period of five years unless the same be revived by writ of scire facias as provided in clause (a) of this section.

NOTE.—This is Section 2 of the Act of May 3, 1909, P. L. 386, 5 Purd. 5892. It has been altered by inserting the words "of record" in line 4, and the word "not" in line 6, the latter word having been omitted, apparently by inadvertence, from the Act of 1909. The last part of the section has been rewritten, in order to make it plain that such judgments are liens as debts not of record for one year only, and that the mode of continuing the lien is by sci. fa. and not by action of assumpsit on the judgment, as was apparently provided by the Act of 1909.

**424. JUDGMENTS WHICH ARE LIENS AT DEATH
TO BE LIENS FOR FIVE YEARS FROM
DEATH; REVIVAL.**

(g) All judgments which at the time of the death of a decedent shall be liens on real estate owned by said decedent at the time of his death, or on real estate which shall have been conveyed by deed not duly recorded during his lifetime, shall continue to bind such real estate during the term of five years from his death, although such judgments be not revived by scire facias or otherwise after his death. Such judgments shall, during such term, rank according to their priority at the time of such death, and after the expiration of such term such judgments shall not continue liens on the real estate of such decedent unless revived by scire facias or otherwise, according to the laws regulating the revival of judgments. Any judgment against such decedent which may be a lien upon real estate sold or aliened by such decedent during his life may be revived by writ of scire facias, according to law; and, for the purpose of any such revival, the writ of scire facias may be issued in the name of such decedent, with the same force and effect as if it were issued in the name of his executors, administrators, or legal representatives; but, before any judgment shall be entered thereon, the legal representatives shall be made parties defendant, and a scire facias shall be served on such legal representatives.

NOTE.—This is Section 3 of the Act of May 3, 1909, P. L. 386, as amended by the Act of May 14, 1915, P. L. 475, 5 Purd. 5892. See Brubaker's Est., 59 Pa. Superior Ct. 109.

**425. EFFECT OF SECTION AS TO MORTGAGES AND
BONDS SECURED THEREBY.**

(h) Nothing contained in this section shall in any way affect or impair the lien of any mortgage given and executed and duly recorded during the lifetime of any decedent; but the bond secured by such mortgage, except as to real estate on which said mortgage is a lien, shall be subject to all the provisions hereof.

NOTE.—This is Section 4 of the Act of May 3, 1909, P. L. 386, 5 Purd. 5892.

Section 52 of the Act of July 16, 1842, P. L. 388, 1 Purd. 1109, provides, in part: "In cases of intestacy, where the real estate of the decedent shall be sold under an order of the orphans' court for distribution, before the expiration of five years from the death of the intestate, the administrators are authorized to apply the proceeds of such sale, whilst in their hands, to

the payment of debts and claims owing by the decedent, for which there may not be other assets in hand * * * *Provided*, That if, before any such payment be made, the distributees of the proceeds of such real estate, their guardians or agents, shall * * * give written notice to such administrators, objecting to such payment, then and in such case, this section shall not justify the same, unless such real estate were or may be otherwise legally liable to such payment." The omitted portions of the section related to past cases. See 2 P. & L. Dig. of Laws, col. 2697, for the full text.

The meaning and purpose of the section are not clear, nor do the decisions make them so. It is recommended that the section be repealed.

426. EXECUTIONS ON JUDGMENTS OBTAINED IN DECEDENT'S LIFETIME.

(i) No execution for the levy or sale of any real or personal estate of any decedent shall be issued upon any judgment obtained against him in his lifetime, unless his personal representatives have been first warned by a writ of scire facias to show cause against the issuing thereof, notwithstanding the teste of such execution may bear date antecedently to his death.

NOTE.—This is a part of Section 33 of the Act of 1834, 1 Purd. 1113, which corresponded, as to the first sentence, to Section 34 of the Commissioner's Draft, and was new in the Act of 1834.

427. DISTRIBUTION OF PROCEEDS OF SHERIFF'S SALE.

(j) In all cases where property, real or personal, of a decedent is sold upon an execution, and more money raised than is sufficient to pay off liens of record, the balance shall be paid over to the executor or administrator for distribution; but before any such payment shall be made, such executor or administrator shall give bond, to the satisfaction of the court, conditioned for the legal distribution of such money: *Provided always*, That such money shall be distributed as the real estate of which it is the proceeds would have been.

NOTE.—This is the remainder of Section 33 of the Act of 1834. See *Fidelity Insurance Trust & S. D. Co. v. Sampson*, 209 Pa. 214.

Under this section of the Fiduciaries Act, P. L. 447, where there is a balance left in the sheriff's hands for distribution after the sale of real estate payable to a fiduciary, the bond of the fiduciary must be entered in the court of common pleas in which the fund has been raised; hence, the orphans' court is without jurisdiction to fix the amount of the security.

This section of the Fiduciaries Act is a re-enactment of Section 33 of the Act of February 24, 1834, P. L. 70, and the practice established under the earlier act should be followed under the later.

Where the practice has been long settled under a statute prescribing the mode of doing a certain act, a re-enactment of the statute in the same words should be construed as approving and confirming the practice, unless it is entirely clear that such practice is defective in the very substance of the requirements of the law. *Catafesta's Est.*, 28 Dist. 304.

428. STAY OF EXECUTION UNTIL APPLICATION TO ORPHANS' COURT FOR SALE OF REAL ESTATE.

(k) In every case of an execution against the executors or administrators of a decedent, whether founded upon a judgment obtained against such decedent in his lifetime, or upon a judgment obtained against them in their representative character, if it shall be made to appear, to the satisfaction of the court issuing such execution, that there is reason to believe that the personal assets and the rents of real estate are insufficient to pay all just demands upon the estate, such court shall thereupon stay all proceedings upon such execution, until the executors or administrators shall have made application to the proper orphans' court for the sale of the real estate of the decedent, or for the apportionment of the assets, or both, as the case may require.

NOTE.—This is Section 35 of the Act of 1834, 1 Purd. 1114, with the addition of the words "and the rents of real estate," to conform to Section 14 of this draft. (See 417 *supra*.)

This and the next section were new in the Act of 1834.

429. ORDER ON EXECUTORS OR ADMINISTRATORS TO APPLY TO ORPHANS' COURT.

(l) It shall be competent for the court, in the cases aforesaid, on application of the plaintiff in such judgment, or of any other person interested as heir, devisee or otherwise, to order the executors or administrators to make application to the orphans' court for the purpose as is hereinbefore mentioned, and to enforce such order by attachment.

NOTE.—This is Section 36 of the Act of 1834, 1 Purd. 1114.

430. SALES AND MORTGAGES OF REAL ESTATE FOR PAYMENT OF DEBTS OF DECEDENTS, —DUTY OF EXECUTOR OR ADMINISTRATOR TO SELL REAL ESTATE WHERE PERSONAL ESTATE AND RENTS ARE INSUFFICIENT TO PAY DEBTS.

SECTION 16. (a) Whenever it shall satisfactorily appear to the executor or administrator that the personal estate of the decedent,

together with the rents of real estate, is insufficient to pay all just debts and the expenses of the administration, he shall proceed, without delay, in the manner hereinafter provided, to sell or mortgage, under the direction of the orphans' court having jurisdiction of his accounts, so much of the real estate as shall be necessary to supply the deficiency.

NOTE.—This is Section 20 of the act of February 24, 1834, 1 Purd. 1116. The first part requires executors and administrators to proceed to sell real estate for payment of debts. The last clause was copied from Section 21 of the Act of April 19, 1794, 3 Sm. L. 143.

The provision as to rents is new, and is inserted because of the provision of Section 14 (see 417 *supra*) of the present draft, making rents assets for the payment of debts. "In the manner hereinafter provided" is substituted for "In the manner provided by law." "Or mortgage" is inserted after "to sell."

At the end, the following words are omitted: "and such real estate so sold shall not be liable in the hands of the purchaser for the debts of the decedent." This is covered by clause (c) of the present section of the draft. (See 454 *infra*.)

Where executors are proceeding without delay under Section 16 of the Fiduciaries Act to sell real estate for the payment of debts, it appearing satisfactorily to them that the personal estate is insufficient to pay the debts, the petition for such sale will have priority over a petition for partition filed by the husband and heir.

Young's Est. (No. 1), 28 Dist. 814, 67 P. L. J. 315.

431. POWER OF ORPHANS' COURT TO AUTHORIZE SALE OR MORTGAGE OF REAL ESTATE.

(b) The orphans' court which possesses jurisdiction of the accounts of an executor or administrator shall have power to authorize a sale or mortgage of real estate by such executor or administrator in the following cases, viz.:—

432. ON APPLICATION OF EXECUTOR OR ADMINISTRATOR.

1. On the application of the executor or administrator, setting forth that the personal estate and the rents of real estate of the decedent are insufficient for the payment of debts.

NOTE.—This is the introductory part, with clause I, of Section 31 of the Act of March 29, 1832, 1 Purd. 1116. The words "or guardian" have been omitted after "administrator" in the second line. The provision as to rents has been inserted for the reason stated in the last preceding note.

At the end, the following words have been omitted: "and maintenance and education of his minor children, or for the purpose of paying the debts

alone." The subject of maintenance and education of children is covered by the revised Price Act.

For the same reason, clause III of Section 31 of the Act of 1832 is now omitted. That clause reads: "On the application of a guardian, setting forth that the personal estate of the minor is insufficient for his maintenance and education, or for the improvement and repair of other parts of his real estate, or that the estate of said minor is in such a state of dilapidation and decay, or so unproductive and expensive, that it would be to the interest and benefit of said minor, in the judgment of said court, that the said estate should be sold; and the orphans' court of the county wherein any such real estate may be situate, shall have the same authority to direct a sale in this latter case as in the cases particularly mentioned in Section 32 of this act."

The Commissioners of 1830 reported that, in Section 31 (Section 32 of their draft), they had collected all existing provisions giving jurisdiction to authorize a sale of real estate by an executor, administrator or guardian. Clause I was derived from Section 19 of the Act of April 19, 1794, 3 Sm. L. 143, amended by the Act of April 8, 1826, P. L. 255. Clause II was founded on Section 2 of the Act of April 1, 1811, P. L. 198. Clause III was derived from Section 10 of the Act of April 7, 1807, P. L. 155.

433. ON APPLICATION OF EXECUTOR OR ADMINISTRATOR OR CREDITOR.

2. On the application of such executor or administrator, or of any creditor of the decedent, setting forth that on the final settlement of the administration account, it appears that the personal assets together with the rents of real estate of the decedent are insufficient to pay the balance appearing to be due from the estate of such decedent, either to the accountant or creditors.

NOTE.—This is clause II of Section 31 of the Act of March 29, 1832, 1 Purd. 1118, with the substitution of "creditor of the decedent" for "person interested" in the second line, and the addition of the provision as to rents of real estate.

434. INVENTORY, STATEMENT OF REAL ESTATE AND ACCOUNT OF DEBTS TO BE FILED.

(c) No authority for the sale or mortgage of real estate, for the payment of debts of a decedent, shall be granted until the executor or administrator shall have exhibited to the court having jurisdiction of his accounts a true and perfect inventory and conscientious appraisalment of all the personal estate whatsoever of the decedent, together with a full and correct statement of all the real estate of such decedent, wherever situated, which has come to his knowledge, and of the rental value of such real estate; and also

a just and true account, upon oath or affirmation, of all the debts of the decedent which have come to his knowledge.

NOTE.—This is Section 33 of the Act of March 29, 1832, 1 Purd. 1118, which, except for the provision as to a statement of the real estate, made no change in the law, and was largely founded upon Section 20 of the Act of April 19, 1794, 3 Sm. L. 143.

It is now changed by omitting the references to guardians and minors, by omitting the provision as to bonds, in view of the general section on that subject in this draft, and by omitting, as unnecessary or obsolete, the proviso, which reads as follows: "*Provided*, That no real estate contained in any marriage settlement shall, by virtue of this act, be sold or disposed of, contrary to the form and effect of such settlement; and that the mansion house, or most profitable part of the estate, shall be reserved to the last."

The provision as to rental value is new.

An enumeration of a debt in a petition for leave to sell real estate to pay debts shows sufficient knowledge thereof to warrant judgment against the administrator in an action of assumpsit. In so holding the court said:

"The defendant sets up as a defense that she was unable to get sufficient information to make a defense. This is undoubtedly a good defense in some cases, but in the present case there is no merit in it. The defendant had knowledge of the claim, and this is shown by the fact set forth in the petition of plaintiffs for the rule, and not denied by defendant, that the defendant had previously filed a petition in the Orphans' Court of Philadelphia County for leave to sell real estate of the decedent for the payment of debts, and among the debts enumerated therein was "claim of Carmine Spinelli, No. 521 Carpenter street, \$2,126.76" being the present claim. This was done in accordance with the requirements of the Fiduciary Act of June 7, 1917, par. (c) P. L. 480, that the defendant set forth "a just and true account, upon oath or affirmation, of all of the debts of the decedent which have come to his knowledge," and the orphans' court, upon this information, granted the order of sale. In addition to this, defendant herself, since the death of her husband, has paid the interest on the mortgages of which the decedent received the principal, which he appropriated to his own use. Under these circumstances, it does not now lie in the mouth of the defendant to say she has no knowledge of plaintiff's claim." *Spinelli v. Costello*, 30 Dist. 411.

435. REFUNDING MORTGAGES.

(d) When a mortgage authorized under the provisions of this section shall fall due or shall be about to fall due, the orphans' court which authorized such mortgage may, on the application of the executor or administrator or of any party in interest, and although the period of the lien of the decedent's debts may have expired at the time of such application, authorize the refunding

of such mortgage and the making of a new bond and mortgage, the proceeds of which may be used for the payment and satisfaction in whole or in part of the said existing mortgage and necessary expenses. Such new mortgage may be for such period and on such terms as to said court shall deem advisable.

NOTE.—This clause is introduced to cover a case which has arisen in practice, and in which the jurisdiction of the courts is at present doubtful.

436. APPOINTMENT OF MASTER.

(e) In all cases where an application shall be made to the court for a decree authorizing the sale or mortgage of real estate under the provisions of this section, the court may appoint a suitable person as master to investigate the facts of the case, and to report upon the expediency of granting the application, and the amount to be raised by such sale or mortgage; and upon such report being made, the court may decree accordingly.

NOTE.—This is Section 34 of the Act of 1832, 1 Purd. 1119, which was new in the Act of 1832. A master is now provided for instead of one or more auditors, and the phraseology has been modified.

437. BOND OF PERSON CARRYING OUT DECREE.

(f) In all cases where the carrying out of any decree of the orphans' court under the provisions of this section shall involve the receipt of money by the person carrying it out, the court shall direct the person acting under the decree to file a bond to the commonwealth in a sufficient amount conditioned for the proper application of all moneys to be received, which bond shall inure to the benefit of all parties interested and be executed by two individual sureties or by one corporate surety, approved by the court, and no such decree shall be executed until such bond, with sureties as may be required, shall be filed: *Provided*, That where a corporation, duly authorized by law, shall be designated to carry out any such decree, the court may, in lieu of security as aforesaid, permit such corporation to enter its own bond without surety.

NOTE.—This section is founded on Section 43 of the Act of February 24, 1834, 1 Purd. 1122, the proviso to Section 4 of the Price Act, 4 Purd. 4022, and Section 5 of the Act of April 3, 1851, 1 Purd. 1120. The proviso is new.

Where a bond has been entered in accordance with the Act of June 7, 1917, P. L. 447, after the orphans' court has decreed a sale of a decedent's real estate, a second bond need not be ordered in a decree for a resale,

as the one already entered will cover the proceeds of the second sale. In so holding, SCHAFER, J., said:

"One of the errors complained of is that, upon a resale of the property ordered by the court, no bond was given. The assumption of the appellant is, and he so presents his cause to us, that the court ordered an additional bond on the resale; an examination of the record discloses no such order made. When the first sale was decreed, a bond was directed to be given in accordance with the Act of June 7, 1917, P. L. 447 (at page 480), which provides that no decree of sale shall be executed until a bond shall be filed. The first sale was set aside on petition of the appellant, on account of inadequacy of price; on the second sale, no new bond was ordered or given, for the all-sufficient reason that the bond already on file covered the purchase money realized by this sale, just as it did the proceeds of the first one." *Randall's Est.*, 269 Pa. 530, 112 Atl. 780.

438. PUBLIC NOTICE OF SALE.

(g) Whenever, by the provisions of this section, it shall be lawful for the court to order the public sale of real estate, public notice of such sale shall be given by the person who is to make the sale, once a week for a period of three weeks before the day appointed therefor, by advertisement in at least one newspaper published in the county, if there be one, or, if there be none, then in an adjoining county; and in all cases, notice shall also be given by handbills, one of which shall be posted at a conspicuous place on the real estate proposed to be sold, and at least three of which shall be posted at three of the most public places in the vicinity of such estate.

NOTE.—This is Section 54 of the Act of March 29, 1832, 1 *Purd.* 1121, with the omission of the word "orphans'" in line 2, and the words, "executor, administrator or guardian, as the case may be," the substitution of "once a week for a period of three weeks" for "at least twenty days," and the substitution of "person" in line 4, and the insertion of the provision as to posting on the premises. The section was new in the Act of 1832.

"This takes the place of Section 54 of the Act of March 29, 1832, P. L. 190, which provided that public notice of the sale should be advertised "at least twenty days before the day appointed therefor." What is meant by "once a week for a period of three weeks"; what does it prescribe and circumscribe? Manifestly twenty-one days is not intended, for if it had been the words twenty-one days would have been used as "twenty days" were in the Act of 1832. This is a legitimate inference from the fact that the later act follows literally the earlier one. Quite as improbable is it that the equivalent of twenty-one days, or three weeks, is intended; for if so the sentence would not have been decorated with the words "a period of." The gentlemen who framed the Fiduciaries Act of 1917 are lawyers and scholars, and judicious brevity and judicial finish mark their

excellent accomplishment. It follows that the words "a period of" were intended to have as they do a significantly qualifying effect. By referring to the dictionaries it will be seen that the word "period" is a Greek derivative. The word is a compound of two Greek words, the first meaning "round about," the other "a way." Among the definitions given are "a portion of time as limited and determined by some recurring phenomenon"; "a stated and recurring interval of time; more generally, an interval of time specified or left indefinite." The definition which apparently was in the mind of the commissioners and which has a rational application is "a division of time in which something is completed." Without fear of contradiction it can be said that it has not been enacted that the notice shall have been advertised for three weeks, or twenty-one days, before the day of the sale. If a sale has been advertised within a period of each of three weeks preceding the day appointed therefor and the sale has been completed within a period of three weeks, the provision of the act has not been violated; and that was done in this case, though only twenty days had elapsed. Certainly it was advertised "round" or "about" three weeks. The words "a period of" were not incorporated heedlessly, without design; and if the interpretation given misses their purpose, what were they for? They ease the confining condition of the act of 1832 and allow a latitude which permits of enough room to avoid a shock to common sense and save the court a gibe of being a red-tape institution.

Per SMITH, P. J., in *Bowman's Est.*, 47 Pa. C. C. 405, 28 Dist. 766, 67 P. L. J. 321, 36 Lanc. Rev. 121, 33 York 2, wherein it was held that under this section of the Fiduciaries Act which provides that a public sale of real estate shall be advertised "once a week for a period of three weeks" an advertisement within a period of each of three weeks is sufficient although covering only twenty days prior to the sale and in a petition to sell real estate of a decedent for payment of debts it is not necessary to set forth all the parties interested or the names of husbands or guardians of those who are married or minors.

439. SECURING UNPAID PURCHASE MONEY.

(h) Whenever, under the provisions of this section, the court has power to authorize or confirm a sale of real estate, the same may be made upon such terms as the court shall approve, all unpaid purchase money to be secured on the premises by mortgage.

NOTE.—This is derived in part from Section 4 of the Price Act, 4 Purd. 4022, and is intended to supersede Section 1 of the Act of March 22, 1859, P. L. 207, 3 Purd. 3386, relating to sales on credit, which is recommended for repeal.

440. ACKNOWLEDGMENT OF DEEDS AND MORTGAGES.

(i) All deeds or mortgages executed in pursuance of any decree of the court under the provisions of this section may be acknowledged before any officer or person now or hereafter authorized by

the laws of this commonwealth to take the acknowledgment of deeds and other instruments of writing to be recorded therein.

NOTE.—This clause is designed to make the law relating to the acknowledgment of instruments executed under the authority of the section similar to the general law prevailing in such cases. There seems to be no reason now for making any special distinction as to the acknowledgment of such instruments.

441. REMOVAL OR INCAPACITY OF FIDUCIARY,— BEFORE CONVEYANCE OR MORTGAGE.

(j) 1. In all cases where the sale of real estate shall be made by an executor or administrator under an order of, or confirmed by, the orphans' court, or where the making of a mortgage by such executor or administrator shall be authorized by said court, under the provisions of this section, and the letters testamentary or of administration shall be revoked, or the executor or administrator shall be removed by the court, or shall die, or become insane, or otherwise be incapable, before a conveyance is made to the purchaser, or before a mortgage is executed and delivered, it shall be lawful for the successor of such executor or administrator, having first given security, to be approved by the said court, for the faithful appropriation of the proceeds of such sale or mortgage, to execute and deliver to the purchaser a deed of conveyance for the estate so sold, on the purchaser's full compliance with the terms and conditions of sale, or to execute and deliver said mortgage. If there shall be no such successor who shall have given security as aforesaid, the said court shall have power, on petition of the purchaser, to direct the clerk of the court to execute and deliver to the purchaser the necessary deed of conveyance, on his full compliance with the terms and conditions of sale, paying into court the moneys payable, and executing and delivering to the clerk any bond and mortgage required by the said terms and conditions, which moneys and bond and mortgage shall remain subject to the disposition of the court; or, where the making of a mortgage by an executor or administrator shall be authorized by said court, the court, under the circumstances aforesaid, shall have power to direct the clerk of the court to execute and deliver such mortgage. The like proceedings may be had where an executor or administrator shall neglect or refuse to execute and deliver such deed or mortgage for the space of thirty days after due notice of an order of the court requiring him to execute and deliver the same.

NOTE.—This is founded on Section 47 of the Act of March 29, 1832, 1 Purd. 1121 (Section 35 of the Commissioners' Draft), which was derived from the Act of April 2, 1802, 3 Sm. L. 499.

In the present draft, a provision as to revocation of letters has been added, the section has been extended so as to include mortgages, and the provision that deeds made in pursuance of the section shall vest the property as effectually as if made by the persons who sold the property has been omitted, being covered by a later clause. The words "the said court shall have power" have been substituted for "it shall be the duty of the said court," and "bond and mortgage" for "sureties."

The words "within three months after such sale" have been omitted before "there shall be no such successor," since there seems to be no reason why proceedings should be delayed for three months.

Section 1 of the Act of May 22, 1878, P. L. 83, 4 Purd. 4035, provides for cases where the fiduciary dies before execution of a deed, and authorizes the court to direct the clerk to deliver a deed, without limiting this authority to cases where there is no successor. It is recommended that this be repealed, as superseded by the provisions of the section as redrafted.

442. WHERE THERE ARE CO-FIDUCIARIES.

2. In all cases where the sale of real estate shall be made by co-executors or co-administrators under an order of, or confirmed by, the orphans' court, or where the making of a mortgage by such co-executors or co-administrators shall be authorized by said court, under the provisions of this section, and one or more of such co-executors or co-administrators shall be removed by said court, or shall die, or become insane, or otherwise be incapable, before a conveyance is made to the purchaser, or before such mortgage is executed and delivered, said court may, upon the facts being made to appear by petition duly verified, authorize the surviving or remaining executor or executors, administrator or administrators, to execute and deliver to the purchaser a deed of conveyance for the real estate so sold, on the purchaser's full compliance with the terms and conditions of sale, or to execute and deliver such mortgage.

NOTE.—This is Section 1 of the Act of May 1, 1861, P. L. 431, 1 Purd. 1123, amended so as to conform to the changes made in the last preceding clause, and so as to provide for an order of the court.

443. BEFORE SALE.

3. Where authority is or shall be given by decree of any orphans' court to executors or administrators to sell real estate, under the provisions of this section, and any of such executors or administrators shall have died, been removed, become insane or otherwise

be incapable, or cease to act, before a sale is effected, in all such cases, said court may, upon the facts being made to appear by petition duly verified, authorize the surviving or remaining executor or executors, administrator or administrators to effect such sale with as full effect in all particulars, as if effected or executed by the executors or administrators in office at the time the sale was originally decreed.

NOTE.—This is the latter part of Section 2 of the Act of May 1, 1861, P. L. 431, 1 Purd. 1123. The first part of that section provides for cases where sale had been made before the passage of the act; this seems unnecessary now.

The part which is retained provides for cases where any trustee "or other person" authorized to sell real estate had died, etc.; and the last line reads "persons acting in the trust, or other office, at the time a sale was originally decreed." The meaning of the words "other person" and "other office" is not clear. They probably refer to executors and administrators, and have been so considered in the present draft. The provision for an order of court is new.

The last sentence of the section is omitted here, being covered by a subsequent clause.

444. EFFECT OF SALE, DEED OR MORTGAGE.

4. Every sale made, and every deed or mortgage executed and delivered in pursuance of, and agreeably to the provisions of this section shall vest the property therein described in the grantee or mortgagee, as fully and effectually as if the same had been made, executed and delivered by all the executors or administrators to whom the authority to sell or mortgage was originally given.

NOTE.—This is derived from parts of Section 47 of the Act of March 29, 1832, 1 Purd. 1121, and Section 2 of the Act of May 1, 1861, P. L. 431, 1 Purd. 1123. The provisions are here extended to mortgages.

445. REVOCATION OF LETTERS, OR REMOVAL OF FIDUCIARY AFTER SALE.

5. In all cases of sales or mortgages under the order of, or confirmed by the orphans' court, under the provisions of this section, the title of the purchaser or mortgagee shall not be affected by the subsequent revocation of the letters testamentary or of administration of the executor or administrator making such sale or mortgage, or by the subsequent removal of the executor or administrator making such sale or mortgage.

NOTE.—This is the first part of Section 16 of the Act of April 9, 1849, P. L. 527, 1 Purd. 1123, extended to include mortgages, with the substi-

tution of "or" for "and" before "confirmed," and with the addition of the last part, beginning "or by the subsequent removal."

In the first line, the words "bona fide," before "sales," have been omitted as unnecessary.

The last part of that section provides that purchasers at orphans' court sales shall have a right to proceed to obtain possession in the same manner as is provided by law as to purchasers at sheriffs' sales. This seems unnecessary now, in view of the Act of April 20, 1905, P. L. 239, 5 Purd. 6100, providing a proceeding for the obtaining of possession by "purchasers at judicial sales of real estate in this commonwealth."

446. EFFECT OF IRREGULARITY OR DEFECT IN APPOINTMENT.

6. Whenever, in pursuance of proceedings in the orphans' court or any county under the provisions of this section, any person therein described as an executor or administrator shall grant and convey or mortgage any real estate, in which proceedings security shall be duly entered by him or her, under the order or decree of the court, no irregularity or defect in his or her original appointment, or the absence of any proper qualification in respect thereto, shall affect the title of the grantee or purchaser, or the liability of the sureties, but the same shall be as valid in all respects as if such irregularity or defect had not existed.

NOTE.—This is Section 1 of the Act of April 28, 1876, P. L. 50, 4 Purd. 4033, extended to include mortgages. The words "or personal" have been omitted before "estate" in line 5, and the words "liability of the sureties" substituted for "security so entered," before "but the same shall be as valid."

The proviso, excluding adjudicated and pending cases, has also been omitted.

447. CONVEYANCE OR MORTGAGE WHERE FIDUCIARY IS PURCHASER OR MORTGAGEE.

(k) Whenever any orphans' court, having jurisdiction under this section to decree a sale or mortgage of real estate, shall issue its order to any executor or administrator to sell or mortgage such real estate, and shall, in any case within its jurisdiction, give authority to any executor or administrator to bid at such sale, and shall confirm the sale to such fiduciary, or shall authorize the making of such mortgage to any executor or administrator, the said court may make an order directing its clerk to execute a deed or mortgage, as the case may be, for said real estate to such purchaser or mortgagee, who shall give security and shall account

for the amount of said purchase money or mortgage money, in the settlement of his accounts, to said court.

NOTE.—This is Section 2 of the Act of May 22, 1878, P. L. 83, 4 Purd. 4035, modified so as to cover mortgages as well as sales of real estate, and with some changes in phraseology.

Section 3 of the Act of 1878 validated conveyances theretofore executed by clerks.

Section 45 of the Act of February 24, 1834, 1 Purd. 1122, providing for refunding bonds by kindred of the decedent on distribution of the proceeds of a sale of real estate, is recommended for repeal, Section 41 of the act, providing for refunding bonds upon distribution of the personal estate, having been omitted in the present draft.

448. REAL ESTATE IN OTHER COUNTIES,—REAL ESTATE IN COUNTY OTHER THAN THAT THE ORPHANS' COURT OF WHICH HAS JURISDICTION OF ACCOUNTS.

(*l*) 1. When the real estate, with respect to which application shall be made to the orphans' court having jurisdiction of the accounts of the executor or administrator, in cases of sales or mortgages for the payment of debts of decedents under clause (*b*) of this section, is situated in the same county, the said court may order the sale or mortgage of such part or so much of such real estate as to them shall appear necessary. When the real estate is situated wholly in another county or counties, and the orphans' court to which such application shall be made shall be satisfied of the propriety of a sale or mortgage of some portion of such real estate not within their jurisdiction, it shall be lawful for such court to make a decree authorizing the raising of so much money as the said court may think necessary, from real estate situated in such county or counties as they may designate; and thereupon it shall be the duty of the orphans' court of the county wherein the real estate so designated is situated, upon the petition of such executor or administrator, to make an order for the sale or mortgage, as they shall think expedient, of so much and such parts of such real estate as shall, in their opinion, be necessary to raise the specified sum; and such executor or administrator shall in all cases make return of his proceedings, in relation to such sale or mortgage, to the orphans' court of the county in which the real estate so sold or mortgaged lies: *Provided*, That where the orphans' court to which such application shall be made shall make a decree authorizing the raising of money from real estate which is wholly without the county where such application shall be made

and is divided by a county line, the further proceedings shall be in the orphans' court of the county where the mansion house is situated, or, if there be no mansion house, in the county where the principal improvements are, or, if there be no improvements, in either county.

NOTE.—This is Section 32 of the Act of March 29, 1832, 1 Purd. 1118, which was new in that act. Some changes have been made in phraseology. The words "or in the same and another county or counties" have been omitted after "when the real estate is situated wholly in another county or counties" in the second sentence, the case of real estate divided by a county line being covered by the proviso and by subsequent clauses. The provision as to confirmation of sale has been omitted, being covered by a general section below. The proviso is new.

It has been held that Section 32 of the Act of 1832 was not repealed by the Price Act: *Burkhart's Appeal*, 1 Mona. 474.

449. REAL ESTATE DIVIDED BY COUNTY LINE.

2. When application shall hereafter be made to the orphans' court having jurisdiction of the accounts of any executor or administrator for leave to sell or mortgage the real estate of a decedent or any part of the same for the payment of debts of such decedent under the provisions of this section, and any part of said real estate is situated partly in the county where said application shall be made and partly in one or more other counties, by reason of a county line or lines running through the same, the said court shall have power to order and direct the sale or mortgage of the whole or any part of said tract of land, irrespective of the county boundary lines, and such sale or mortgage shall be as effectual to pass the title of such real estate to the purchaser or mortgagee as if the whole of said tract of land had been within the boundaries of the county having jurisdiction of the accounts of the executor or administrator. Notices of said sale or mortgage, as required by this section, shall be given in all the counties in which the land is situated, and a certified copy of all proceedings in connection with said sale or mortgage shall be filed in the orphans' court of each county in which said land is situated. Any mortgage taken by such executor or administrator to secure the purchase money, or any part thereof, shall be duly recorded in each of the counties in which said lands lie, as now required by law.

NOTE.—This is a combination of Section 1 of the Act of June 4, 1883, P. L. 65, 1 Purd. 1121, relating to sales by executors or administrators, and Section 1 of the Act of May 21, 1901, P. L. 272, 3 Purd. 3387, relating to sales by guardians. The word "proper" has been omitted before "or-

phans' court" in the second line. The references to confirmation and return of sale and to judgments and other obligations have been omitted.

The Act of June 7, 1901, P. L. 513, 1 Purd. 1123, validating previous sales, may be allowed to stand.

450. PRIVATE SALES,—WHEN AUTHORIZED.

(m) 1. The orphans' courts of the several counties of this commonwealth, in all cases where, under the provisions of this section, such courts have power to order the sale of real estate, may authorize or direct a private sale, if, in the opinion of the court, under all the circumstances, a better price can be obtained at private than at public sale, as where the interest shall be undivided, or for any other sufficient cause.

NOTE.—This is Section 1 of the Act of May 9, 1889, P. L. 182, 1 Purd. 1121, altered by substituting "under the provisions of this section" for "under existing laws," by omitting, after "the sale of real estate" the words "for the payment of the debts of decedents and for other purposes," and by substituting "authorize or direct" for "decree and approve."

Before this act, the court had no jurisdiction to decree a private sale for the payment of debts: *Miller v. Spear*, 21 W. N. C. 554; *McPherson v. Cunliff*, 11 S. & R. 422.

Section 2 of the Act of May 21, 1901, P. L. 272, 4 Purd. 4034, authorizing private sales "for the payment of debts of a ward and for other purposes," is also covered by the present section and should be repealed. What was meant by sales "for the payment of debts of a ward" is not clear, no previous act having authorized such sales.

451. PUBLIC NOTICE.

2. Before authorizing or directing any private sale of real estate for payment of debts of a decedent, public notice thereof shall be given by advertisement printed in at least one newspaper, published in the county where such real estate is situated, once a week for a period of three weeks prior to the date fixed by such order for authorizing or directing such sale; and also written or printed notices, one of which shall be posted at a conspicuous place on the real estate proposed to be sold, and at least three of which shall be posted at three of the most public places in the vicinity of such real estate; and, before authorizing or directing such sale, the court shall require proof, by affidavit to be filed in the proceeding, that notice as aforesaid has been given. Such notice shall specify the location and description of the real estate proposed to be sold, the name of the proposed purchaser and the price agreed to be paid.

NOTE.—This is founded on Sections 1 and 2 of the Act of June 9, 1911, P. L. 724, 6 Purd. 7037, and the amendment of June 12, 1913, P. L. 470, 6 Purd. 7037.

The changes made are to substitute "authorizing or directing" for "authorizing, decreeing, or approving," to omit the provision for advertisement in the legal periodical, to change "for at least twenty days" to "once a week for a period of three weeks," and to add the last sentence.

452. OBJECTIONS TO SALE.

3. On the day fixed by such order and notice for authorizing or directing such private sale, any creditor of such decedent, or party interested as heir, devisee or intending purchaser, or any legatee whose legacy is, by the express terms of the will, or by law, charged on such real estate, may appear and object to such private sale on account of the insufficiency of the price, and, if such objection be sustained, may offer to give or pay a substantial increase for such property, and the court, at its discretion, may thereupon authorize or direct such sale, or refuse to authorize or direct the same, and accept any substantially increased offer, and may authorize the sale of such property to such new bidder upon compliance with the conditions of sale and giving such security as shall be directed by the court; or, such creditor, party interested or legatee may appear as aforesaid and object to such sale on any legal or equitable grounds: *Provided*, That nothing herein contained shall be construed to affect the existing law with respect to objections to public sales.

NOTE.—This is founded on Section 3 of the Act of June 9, 1911, P. L. 724, 6 Purd. 7037.

The provision as to legacies charged on land is new, as is the provision for objection to the sale on grounds other than insufficiency of price. Several changes have also been made in the phraseology.

Section 4 of the Act of 1911 (6 Purd. 7037) validated sales previously made under the Act of 1889, and need not be reenacted. The same is true of the Acts of April 4, 1901, P. L. 66, 1 Purd. 1121, and April 10, 1915, P. L. 112, 6 Purd. 7289, and the Act of July 21, 1913, P. L. 871, 5 Purd. 5893, validating sales and mortgages made under order of the orphans' court.

Under the language of the Fiduciaries Act and the Revised Price Act of 1917 relating to private sales of real estate, and the confirmation of same, it is the duty of the court to accept any substantially increased offer over that offered by the purchaser. As a matter of practice, offers should be in writing accompanied by a certified check for the increase. It was never intended that the parties should make oral bids in open court. In so holding, STEWART, P. J., after reviewing the facts, said:

"Those sections are not found in the original acts, but under the old acts, the court unhesitatingly set aside private sales for inadequacy of price.

* * * * *

"We have no rule of court on this subject, nor do we find any in the orphans' court rules of Philadelphia county, but in the case of Early's Estate, 24 Pa. Dist. Rep. 153, Judge DALLETT ordered that a private sale of property for \$30,000 should be set aside and a public sale granted upon the parties filing bond. In that case the private sale had been confirmed. The application was to set it aside and the petitioner offered to pay \$33,000 for the property. On the argument counsel for the first petitioner offered \$34,500. The deed had not been delivered, and the court made the above order, putting the property up at public sale. In the present case the application by Reuben was to have the property put up at public sale. We do not think the increase offered justifies the expense of a public sale. It may be necessary to formulate a rule of court upon this subject. It is certainly irregular to permit oral bids as was done in this case, and in Early's Estate." Mauch's Est., 47 Pa. C. C. 490, 67 P. L. J. 308, 33 York 45, 16 North. 405.

453. RETURN AND CONFIRMATION.

(n) All public sales of real estate under the provisions of this section shall be subject to confirmation by the court; but in the case of private sales authorized or directed under the provisions of this section, no return or confirmation shall be necessary.

NOTE.—This is a new section, introduced in order to make the practice uniform and free from doubt.

Where authority is given to a fiduciary to make public sale of real estate, obviously the fiduciary should make return of his doings to the court and have the sale confirmed; but the same reason would not apply where, as in the case of a private sale, the price and terms of sale and the name of the purchaser appear in the petition. The court having approved the sale and directed that it be carried out, it seems unnecessary for the fiduciary to report to the court and obtain a confirmation of what he was instructed to do.

454. DISCHARGE OF LIENS.

(o) All public or private sales of real estate under the provisions of this section shall have the effect of judicial sales as to the discharge of liens upon the real estate so sold: *Provided*, That the court may decree a sale of the real estate freed and discharged from the lien of any mortgage otherwise preserved from discharge by existing law, if the holder of such mortgage, by writing filed in said court, shall consent to the sale being so made.

NOTE.—The first part is declaratory of the existing law. As to the effect of private sales for the payment of debts in discharging liens, see O'Brian v. Wiggins, 14 Pa. Superior Ct. 37.

A public sale of real estate under the provisions of this act may well stand on the same footing as a sheriff's sale so far as the discharge of record liens is concerned; and a private sale of real estate for the payment of debts is by the terms of this section subject to equivalent formalities of procedure.

The proviso is derived from Section 2 of the Act of May 19, 1893, P. L. 110, 1 Purd. 1185.

455. PURCHASER NOT BOUND TO SEE TO APPLICATION OF PURCHASE MONEY.

(p) Whenever a public or private sale of real estate shall be authorized or directed by any orphans' court under the provisions of this section, the person or persons purchasing the real estate so sold and taking title thereto in pursuance of the decree of the court, shall take such title free and discharged of any obligation to see to the application of the purchase money.

NOTE.—This is a new section, modeled upon Section 1 of the Act of June 10, 1911, P. L. 874, 7 Purd. 7703, which related only to sales under testamentary powers, and is the basis of Section 30 of the present draft. (See 496 *infra*.) The Act of 1911 superseded Section 19 of the Act of February 24, 1834, P. L. 70, 1 Purd. 1122, which provided for payment of purchase money into court.

456. PROCEEDINGS TO RELIEVE REAL ESTATE FROM LIEN OF DEBTS,—PETITION.

SECTION 17. (a) It shall and may be lawful for any executor, administrator, trustee, or any party interested in the real estate of any decedent, to present a petition to any court having jurisdiction of the settlement of such estate, setting forth all the particulars, and also that there are just and reasonable grounds for believing that said decedent left no debts not of record, and that it is desirable to have the real estate of said decedent relieved from any lien now given by law for such debts.

NOTE.—This is Section 2 of the Act of June 8, 1893, P. L. 392, 1 Purd. 1108, except that, in the fourth line, "a petition" is substituted for "his, her or their petition."

457. HEARING BY COURT OR MASTER; NOTICE.

(b) Said court may hear and determine the same, or refer such petition to a master, whose duty it shall be to inquire diligently into the facts and circumstances alleged in such petition, and report the same to said court. The court may in its discretion direct such

notices to be given of such application, by publication or otherwise, as it may deem necessary.

NOTE.—This is Section 3 of the Act of June 8, 1893, P. L. 392, 1 Purd. 1108, modified by omitting in the first line, after “court,” the words “having jurisdiction as aforesaid”; by omitting in the same line, after “same,” the words “and shall have power” and inserting “or”; by omitting “any” before “such petition” in the fourth line; by omitting “said” before “court” in the fifth line; and by omitting “either” after “application” in the sixth line.

458. DECREE; BONDS BY PERSONS ENTITLED TO REAL ESTATE.

(c) It shall be the duty of said court, upon being fully satisfied as to the truth and justice of the matters alleged in any such petition, to decree that the real estate of such decedent shall be held and enjoyed free and clear of any lien or debts not of record of said decedent, and said court shall require the person or persons entitled to said real estate to enter bond, in such form and amount, and with or without sureties, as the court may in its discretion determine, conditioned for the payment by such person or persons of an amount sufficient to pay any debts of the decedent not of record, which may thereafter be proved and which would have been liens upon said real estate but for such decree.

NOTE.—This is Section 4 of the Act of 1893, 1 Purd. 1108, modified by omitting “and application” after “petition,” “any” before “such decedent,” and “and direct” after “decree,” and by adding the provisions in regard to bonds. Section 5 is a general repealer.

459. CONTRACTS OF DECEDENTS FOR SALE OR PURCHASE OF REAL ESTATE,—PETITION NOTICE, HEARING AND DECREE OF SPECIFIC PERFORMANCE.

SECTION 18. (a) Where any person shall have, by contract in writing, agreed to sell and convey any real estate in this commonwealth, and died seized or possessed thereof, or of an undivided interest therein, or where any person shall have purchased, in writing, any real estate in this commonwealth and died without paying the purchase money therefor, it shall be lawful in all such cases for the executor or administrator of the deceased vendor, or for the vendor when the purchaser may have died, or for the purchaser of such real estate, or, when he has died, for his executor or administrator, or for any other person interested in such con-

tract, to petition the orphans' court having jurisdiction of the accounts of the executor or administrator of the deceased vendor or the deceased purchaser, as the case may be, setting forth the facts of the case. After due notice of such petition to the persons interested, according to the nature of the proceeding, to appear in such court, on a day certain, and answer the petition, such court shall have power, if the facts be sufficient in equity, no sufficient cause being shown to the contrary, to decree specific performance of such contract according to the true intent and meaning thereof.

NOTE.—This is Section 1 of the Act of April 28, 1899, P. L. 157, 1 Purd. 743, with some slight changes in phraseology, and the insertion, in the fourth line, of the words "or of an undivided interest therein," to cover the provisions of Section 1 of the Act of February 8, 1848, P. L. 27, 1 Purd. 742.

Section 1 of the Act of 1899, which apparently supplied Section 15 of the Act of February 24, 1834, P. L. 75, 1 Purd. 741, extended the remedy to cases of deceased purchasers and allowed the petition to be filed by any person interested in the contract.

Sections 15 to 18 of the Act of 1834 were founded on the Acts of March 31, 1792, 3 Sm. L. 66; March 12, 1804, P. L. 271; and March 10, 1818, P. L. 183, which provided a remedy in the common law courts.

The language of Section 18 (a) of the Fiduciaries Act as to persons dying "seized or possessed" of real estate, includes any person who was the owner thereof at the time of his death.

"The contention of complainant's solicitor that this Act applies only where the deceased vendor dies 'possessed' of the real estate in question, is untenable, for the language of said Section 18 (a) is 'seized or possessed' and both conditions are thus included, and it is not questioned that the testator died seized of the real estate in question at bar. To die 'seized' means to die the 'owner of,' 'seized' being equivalent to 'owning.' In re: Stevens, 12 N. E. 759, (N. Y.). The bill discloses the fact that the vendor 'owned' or was 'seized' of the legal title at his decease and by virtue of the contract the complainant of the equitable title. We note in passing that uniformly the vendee under articles is the one in possession.

"While it would seem therefore that we could rely solely upon the provisions of the Orphans' Court and Fiduciaries Acts just mentioned, in view of the insistence of complainant's solicitor *contra*, we will refer to other legislation and judicial decisions. The case of Gable v. Whiteside, 242 Pa. 188, holds under the Act of April 28, 1899, P. L. 157, which gave jurisdiction to the orphans' court to hear and decree specific performance of contracts for sale of real estate by vendor, deceased, at the time of the application, that the jurisdiction of said court is exclusive, and neither a common law court or a chancellor has jurisdiction in such case and reversed such decree of a chancellor in equity below. The language of the Act of 1899 and of the eighteenth section (a) of that of 1917 is literally the same with the exception the latter broadens the subject matter of jurisdiction, and Gable v. Whiteside, *ante*, applies to the case at bar.

"Besides the mandate of the Statute of 21 March, 1806 (Purd. Dig. 271), providing that a statutory remedy if existing must be strictly pursued reinforces the effect we must give to the two Acts of 1917 cited above. Should it be contended that the strictness of procedure thus required applies only to the procedure once adopted, and not to the remedy or jurisdiction, we are relieved of doubt by the decision of *Whitney v. Jersey Shore*, 266 Pa. 537, which holds that when a statutory remedy is provided whereby a legal right may be effectually settled, it is necessary to pursue the remedy and thus establish the right, and is peculiarly appropriate authority here from the fact that in both that case and at bar an injunction is prayed for, and it is apparent that relief in equity or otherwise by injunction proceedings is not necessary for any purpose because of the requirements of (c) of the eighteenth section of the Fiduciaries Act (P. L. 487, of 1917) of the filing and indexing as *lis pendens* a certificate from the clerk of the orphans' court of the filing in the latter court the petition for specific performance.

" * * * By the jurisdiction of and proceedings in the orphans' court under the Orphans' Court and Fiduciaries Acts of 1917 cited above, all contraverted questions raised by the bill at bar are judiciable. Therefore, the adequate remedy thus exists and its legislative exclusiveness of resort precludes any other because of any claimed greater convenience." *SMITH*, P. J., in *Wykoff v. Manzer*, 22 Lack. 308.

460. REMEDY IN ORPHANS' COURT EXCLUSIVE.

(b) The aforesaid remedy, by petition to the orphans' court, shall hereafter be exclusive.

NOTE.—This is a new provision, declaratory of the existing law.

There was some conflict in the early opinions, and in *Mussleman's Appeal*, 65 Pa. 480, it was remarked by Mr. Justice AGNEW that it was perhaps unfortunate that the Supreme Court, in *Wetherill v. Seitzinger*, 9 W. & S. 177, and in an unreported case, had decided that the Act of 1834 did not oust the jurisdiction of the common pleas under the Act of 1792.

The Commissioners of 1830 reported: "We have transferred the jurisdiction and power of giving relief in all cases within the act, from the common pleas to the orphans' court. The constitution and process of the latter tribunal seem to us peculiarly to fit it for all questions of chancery jurisdiction, and particularly for cases like that provided for in these sections, where various parties may be interested and various inquiries may be necessary, for the best prosecution of which, the powers of the common law courts are entirely inadequate. The course of proceedings suggested is believed to have the advantage of greater simplicity, and at the same time of greater efficacy than that at present authorized."

This was a clear indication that the Commissioners of 1830 were of opinion that the earlier acts should be repealed.

The matter is now set at rest by the decision of the Supreme Court, in *Gable v. Whiteside*, 242 Pa. 188, that the jurisdiction of the orphans' court is exclusive. The present commissioners, therefore, recommend that the

acts giving jurisdiction to the court of common please be expressly repealed.

The acts in question are as follows: March 31, 1792, 3 Sm. L. 66, Sections 1-3, 1 Purd. 738, 739; March 12, 1804, (4 Sm. L. 158) P. L. 271, Section 1, 1 Purd. 739; March 10, 1818 (7 Sm. L. 79), P. L. 183, Sections 1-3, 1 Purd. 740, 741; February 5, 1821 (7 Sm. L. 357), P. L. 25, Section 2, 1 Purd. 739; and April 3, 1851, P. L. 305, Section 6, 1 Purd. 741.

A court of equity has no jurisdiction to enforce specific performance of a contract made by a decedent for the sale of land of which he died seized.

Jurisdiction in such a case is vested in the orphans' court by Section 9 (i) of the Orphans' Court Act of June 7, 1917, P. L. 372; and Section 18 of the Fiduciaries Act of June 7, 1917, P. L. 486, providing the mode of procedure by petition to the orphans' court, also makes that remedy exclusive.

The orphans' court formerly had the same exclusive jurisdiction under the Act of April 28, 1899, P. L. 157.

The adequate remedy provided by the Orphans' Court Act and the Fiduciaries Act of 1917, and its legislative exclusiveness of resort, precludes any other remedy sought on the ground of greater convenience.

The language of Section 18 (a) of the Fiduciaries Act as to persons dying "seized or possessed" of real estate, includes any person who was the owner thereof at the time of his death.

"Passing to the demurrer itself, we note that by Section 9 (i) of the Orphans' Court Act of June 7, 1917, P. L. 372, jurisdiction of that court is given to 'embrace'—

"The contention of complainant's solicitor that this act applies only convey any real estate of which such decedents shall die seized,' and the proceedings therefor by petition to said court by the Fiduciaries Act of 1917, Section 18 (a) P. L. 486, 'such court shall have power if the facts be sufficient in equity, no sufficient cause being shown to the contrary, to decree specific performance of such contract according to the true intent and meaning thereof.'

"By the same section (b) (P. L. 487) it is provided that 'the aforesaid remedy by petition to the orphans' court shall hereafter be exclusive.'

"The contention of complainant's solicitor that this act applies only where the deceased vendor dies 'possessed' of the real estate in question, is untenable, for the language of said Section 18 (a) is 'seized or possessed' and both conditions are thus included, and it is not questioned that the testator died seized of the real estate in question at bar. To die 'seized' means to die the 'owner of,' 'seized' being equivalent to 'owning.' In *re Stevens* 12 N. E. 759 (N. Y.) the bill discloses the fact that the vendor 'owned' or was 'seized' of the legal title at his decease and by virtue of the contract the complainant of the equitable title. We note in passing that uniformly the vendee under articles is the one in possession.

"While it would seem therefore that we could rely solely upon the provisions of the Orphans' Court and Fiduciaries Acts just mentioned, in view of the insistence of complainant's solicitor *contra*, we will refer

to other legislation and judicial decisions. The case of *Gable v. Whiteside*, 242 Pa. 188, holds under the Act of April 28, 1899, P. L. 157, which gave jurisdiction to the orphans' court to hear and decree specific performance of contracts for sale of real estate by vendor, deceased, at the time of the application, that the jurisdiction of said court is exclusive, and neither a common law court or a chancellor has jurisdiction in such case and reversed such decree of a chancellor in equity below.

"The language of the Act of 1899 and of the 18th Section (a) of that of 1917 is literally the same with the exception the latter broadens the subject matter of jurisdiction and *Gable v. Whiteside ante* applies to the case at bar.

"Besides the mandate of the statute of 21 March, 1806 (Purd. Dig. 271), providing that a statutory remedy if existing must be strictly pursued reënforces the effect we must give to the two Acts of 1917 cited above. Should it be contended that the strictness of procedure thus required applies only to the procedure once adopted, and not to the remedy or jurisdiction, we are relieved of doubt by the decision of *Whitney v. Jersey Shore*, 266 Pa. 537, which holds that when a statutory remedy is provided whereby a legal right may be effectually settled, it is necessary to pursue the remedy and thus establish the right, and is peculiarly appropriate authority here from the fact that in both that case and at bar an injunction is prayed for, and it is not necessary for any purpose because of the requirements of (c) of the 18th Section of the Fiduciaries Act of the filing and indexing as *lis pendens* a certificate from the clerk of the orphans' court of the filing in the latter court the petition for specific performance. * * *

"By the jurisdiction of and proceedings in the orphans' court under the Orphans' Court and Fiduciaries Acts of 1917 cited above, all controverted questions raised by the bill at bar are judiciable. Therefore, the adequate remedy thus exists and its legislative exclusiveness of resort precludes any other because of any claimed greater convenience." *SMITH, P. J.*, in *Wykoff v. Manzer*, 22 Lack. 308.

461. INDEXING OF PETITION IN JUDGMENT INDEX.

(c) When any petition for the specific performance of any such contract shall have been filed, it shall be the duty of the prothonotary of the court of common pleas of the county in which such real estate or any part thereof shall lie, on being certified by the clerk of the orphans' court in which such petition shall have been filed of the fact of such filing, to enter the same upon the judgment index under the name of the respondent in such petition, and to certify the same as *lis pendens* in any certificate of search that he may be required to make by virtue of his office.

NOTE.—This is a new provision, modeled upon Section 1 of the Act of June 15, 1871, P. L. 387, 4 Purd. 4060. See also the Act of April 22, 1856, P. L. 532, Section 2, 2 Purd. 1303.

This provision seems preferable to that of Section 2 of the Act of April 28, 1899, P. L. 157, 1 Purd. 743, which was a copy of Section 17 of the Act of 1834, 1 Purd. 742, and reads as follows: "The order or decree of the orphans' court for the specific performance of any such contract, in the cases hereinbefore mentioned, being certified by the clerk of such court, under the seal thereof, may be recorded in the office for the recording of deeds in the county where such real estate is situate, in like manner as deeds are recorded, and with the same effect."

It is recommended that this section be repealed, since, if the decree is followed by a deed, which will itself be recorded, the recording of the decree seems unnecessary. The indexing of the petition, as provided by clause, (c), *supra*, will be more satisfactory.

See Wykoff v. Manzer, 22 Lack. 308.

462. EXECUTION AND EFFECT OF DEED; DECREE FOR PAYMENT BY REPRESENTATIVES OF DECEASED VENDEE.

(d) When such order or decree for the specific performance of any such contract shall have been made, and the purchase money paid or secured to be paid according to the terms of such contract, it shall be the duty of the vendor, or, when he shall be deceased, of his executors or administrators, to execute such deed of conveyance as shall be directed by the court in conformity with the intention of such contract. Such deed, being so made by such executors or administrators, shall have the same force and effect to pass and vest the estate intended as if the same had been executed by the decedent in his lifetime. In the case of an order or decree for specific performance by the executors or administrators of a deceased vendee, the court shall enter a decree for payment by such executors or administrators, out of the estate of their decedent, of the amount of purchase money, with interest, if any, which decree may be enforced in like manner as other decrees of the orphans' court for the payment of money. The liability for the costs of such proceedings shall be in the discretion of the court.

NOTE.—This is Section 3 of the Act of April 28, 1899, 1 Purd. 743, which was a copy of Section 18 of the Act of 1834, 1 Purd. 742, except for the insertion of the provision for conveyance by the vendor himself, intended to cover the case of a deceased vendee.

The third sentence has now been added to cover the case where the decree of the court is for payment of purchase money by the estate of a deceased vendee. The provision as to costs is also new.

463. ENFORCEMENT OF PAROL CONTRACTS.

(e) Like proceedings may be had in all respects wherever any parol contract shall have been entered into by any person for the conveyance of real estate within this commonwealth and the purchaser shall have died without fully executing such contract, or wherever any person may have made such parol agreement and died seized or possessed of such real estate and no sufficient provision for the performance of such contract shall have been made by the decedent, in all cases where such parol contract shall have been so far executed that it would be against equity to rescind the same.

NOTE.—This is Section 4 of the Act of April 28, 1899, 1 Purd. 743, except that the latter part, beginning “and no sufficient provision,” follows the phraseology of Section 16 of the Act of 1834, 1 Purd. 742, from which Section 4 of the Act of 1899 was derived.

The Act of 1899 reads, “and such parol contract may have been so far executed by possession, by improvement, or by partial payment of purchase money, that it would be against equity to rescind the same.”

The commissioners are of opinion that it is better to use the general language of the Act of 1834 rather than to attempt to define in this act the part performance which is sufficient to take a parol contract for the sale of land out of the Statute of Frauds.

464. EXECUTION OF DEED WHERE GRANTEE IS EXECUTOR OR ADMINISTRATOR.

(f) In all cases of specific performance of contract which may hereafter be decreed by any orphans’ court under the provisions of this section, where the party to whom the deed is to be made is an executor or administrator of the deceased vendor, the deed shall be made, as in other cases, by the co-executor or co-administrator, if there be one; and if there be none, the court may make an order directing its clerk to execute such deed and deliver the same to the grantee therein named, upon such terms as the court shall see fit to require from the grantee, as executor or administrator of the decedent, for securing the faithful appropriation of the unpaid purchase money.

NOTE.—This is Section 2 of the Act of April 9, 1849, P. L. 511, 1 Purd. 742, changed by referring to “the provisions of this section” instead of Sections 15, 16 and 17 of the Act of 1834, and by providing that the deed shall be executed by the clerk of the orphans’ court instead of by the sheriff.

465. NOTICE OF DEVISE OR BEQUEST TO CORPORATION.

SECTION 19. Whenever a devise or bequest shall be made to any corporate body, by any last will and testament, the executors thereof shall, within three months after they undertake the execution of such will, make known, by letter addressed to such corporate body, the nature and amount of such devise and bequest, together with their names and places of residence.

NOTE.—This is Section 66 of the Act of 1834, 1 Purd. 1100, changing "six months" to "three months," and omitting "public" before "corporate body." The main object of the section is notice to charitable corporations, and "public" might seem to restrict it to municipalities.

The section was copied from Section 5 of the Act of April 6, 1791, 3 Sm. L. 20, which, however, imposed the duty of giving notice upon the register of wills. It is to be noted that Section 5 of the Act of 1791 is printed in 4 Purd. 4079 and in 3 P. & L. 6455, 6456, as still in force. It was evidently intended to be repealed by the Act of 1834, and should now be expressly repealed.

466. ABATEMENT OF LEGACIES.

SECTION 20. If, after deducting the amount of debts of the testator and the expenses of administration, the residue shall not be sufficient to discharge all the pecuniary legacies bequeathed, an abatement shall be made, in proportion to the legacies so given, unless it shall be otherwise provided by the will.

NOTE.—This is Section 48 of the Act of February 24, 1834, 1 Purd. 1132, which was derived from the last clause of Section 1 of the Act of March 21, 1772, 1 Sm. L. 383.

It is now modified by inserting after "debts" the words "of the testator and the expenses of administration," instead of the words "as aforesaid," which referred to Section 47 of the Act of 1834.

467. WHEN LEGACIES SHALL BE PAYABLE; INTEREST ON LEGACIES.

SECTION 21. Legacies, if no time be limited by the will for the payment thereof, shall, in all cases, be deemed to be due and payable at the expiration of six months from the death of the testator. Interest on all pecuniary legacies, whether bequeathed directly or in trust, shall, unless a contrary intention appear by the will, begin to run from the expiration of one year from the death of the testator, except that if the account of the executor be filed and confirmed and distribution awarded before the end of such year, then interest on such legacies shall run from the date of the award:

Provided, That where a pecuniary legacy is bequeathed to or for the use of the widow of the testator or any child or descendant of the testator, or any person toward whom the testator in his lifetime stood in loco parentis, or for the maintenance of any person, interest shall, unless a contrary intention appear by the will, begin to run from the date of the death of the testator.

NOTE.—The first four lines of this section, down to the word “testator,” are copied from Section 51 of the Act of 1834, 1 Purd. 1134, which was derived from Section 7 of the Act of March 21, 1772, 1 Sm. L. 383. The only change is to substitute “six months” for one year. The remainder of the section is new.

In this section, legacies are made payable at the end of six months, for the reason that in other sections of this act the commissioners have recommended that executors and administrators should file their accounts at the expiration of this period after the issuance of letters. It is, however, recommended that interest should not begin to run on legacies until after the expiration of one year or an earlier award; as in future most accounts will be filed at the end of six months from the grant of letters, the award of legacies will not be complicated by the calculation of interest.

Interest on legacies to or for the use of a widow or children or those to whom the testator stood in loco parentis, and legacies for maintenance, will, unless it be otherwise provided, run from the death of the testator; but legacies bequeathed in trust for other persons will not carry interest from the date of death, the commissioners having here adopted the views of Judge PENROSE in *Twell's Estate*, 11 D. R. 713.

Under this section of the Fiduciaries Act, where a pecuniary legacy is bequeathed to or for the use of the widow of the testator, the interest, unless a contrary intention appear by the will, begins to run from the date of the death of the testator. A direction in a will to set aside a fund for the widow's use “as soon as possible after my death,” does not denote a contrary intention on the part of the testator. *Wagner's Est.*, 13 Berks 6, 30 Dist. 435.

“It was argued on behalf of Florence Hadfield that the testator intended the bequest of \$25,000 to be preferred to the other legacies, because the testator directed that it be paid ‘immediately.’ The auditing judge cannot agree with this argument. Manifestly, the intention of the testator was to specify merely the time when the legacy was to be paid, not to give it priority over others in case of a deficiency of assets to pay all in full. *Murdoch's Appeal*, 31 Pa. 47, was virtually a contest between the annuitants and the residuary legatees, and was decided on that ground. The onus is always on the legatee who claims a priority of payment, *Bard's Estate*, 58 Pa. 393, and a mere provision that the legacy is due immediately instead of at the expiration of a year is not sufficient proof of such intention. The same remark applies also to the widow's legacy of \$25,000, also directed to be paid immediately. But under the Fiduciaries Act of 1917, Section 21, the legacies to the widow and to Florence Hadfield are entitled to interest from the date of death, because they are due immediately, and

besides, in the case of the widow, she is entitled to interest by the express provision of that section of the Fiduciaries Act." Per G^{EST}, J., in *Greaves' Est.*, 29 Dist. 577.

Under this section of the Fiduciaries Act, interest begins to run on a legacy bequeathed in trust (with certain exceptions mentioned in the section) only from the expiration of one year from the testator's death; the act in this respect changed the existing law.

ANDERSON, J., for the court in banc, held: "We agree with the auditing judge in this case that, under the law as it now stands, interest does not run on this trust legacy until either the end of the year or the time of the adjudication. And while it is clearly shown by the argument of exceptant's counsel that, prior to the Fiduciaries Act of June 7, 1917, P. L. 447, interest would be allowed in such a case as this, yet it must be borne in mind that at the drafting of this act the commissioners, with the knowledge that trust legacies carried interest from the date of the death, while pecuniary legacies did not, so changed the law as to make trust legacies, except under certain conditions, which do not exist in this case, bear interest, as above stated, not until the end of the year or the filing of the adjudication. The change was made deliberately, and we are bound by the law as it now exists." *Sterrett's Est.*, 29 Dist. 147.

468. APPORTIONMENT OF INCOME.

SECTION 22. All annuities and all payments of rents, income, interest or dividends of any real or personal property, directed by any will to be made during the lifetime of the beneficiary, or for the life or lives of another person or persons, or for a term of years, shall, like interest on money lent, be considered as accruing from day to day, and shall be apportioned to the date of the death of such beneficiary or of such cestui que vie, or to the end of such term of years.

NOTE.—This is a new section, modeled to some extent on the English Apportionment Act of 33 and 34 Victoria, Chapter 35. Under the existing law, income is apportionable in some instances and not in others. See the cases cited in 11 P. & L. Dig. of Decisions, col. 18690; *MacIlwain's Estate*, 20 D. R. 1073.

It is to be noted that Sections 7 and 30 of the Act of February 24, 1834 (Sections 11 (*e*) (see 396 *supra*) and 35 (*e*) (see 516 *infra*) of the present draft), were derived from the statute of 11 George II, Chapter 19, which was the first of a series of statutes in England, culminating in the above cited statute of Victoria, which provides that "all rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportioned in respect of time accordingly."

The change now recommended by the commissioners was suggested by THAYER, P. J., in *Stewart v. Swaim*, 7 W. N. C. 407.

469. SECURITY BY ONE ENTITLED TO INCOME OR PROCEEDS OF SALE OF DECEDENT'S REAL ESTATE; AND BY LEGATEE FOR LIFE, FOR TERM OF YEARS, OR OTHER LIMITED PERIOD OR ON CONDITION OR CONTINGENCY; APPOINTMENT OF TRUSTEE ON REFUSAL, NEGLECT OR INABILITY TO ENTER SECURITY.

SECTION 23. Whenever any person is or shall be entitled to the income from the proceeds of the sale of a decedent's real estate, and whenever any personal property, or the increase, profits or dividends thereof, has been or shall hereafter be bequeathed to any person, for life, or for a term of years, or for any other limited period, or upon a condition or contingency, the executor or executors, administrator with the will annexed, trustee or trustees under such will, or trustee appointed by the orphans' court to make such sale of real estate, as the case may be, shall deliver the property so bequeathed to the person entitled thereto, upon such person giving security in the orphans' court having jurisdiction, in such form and amount as, in the judgment of the court, will sufficiently secure the interest of the person or persons entitled in remainder, whenever the same shall accrue or vest in possession. Should such person or legatee refuse or neglect or be unable to enter such security, the court may, upon petition of any person interested, including the owner of any subsequent interest, vested or contingent, in such proceeds of real estate, personal property, or the increase, profits or dividends thereof, and upon due notice to all persons interested, so far as such notice can reasonably be given, appoint a suitable person or corporation as trustee to receive and hold such proceeds of sale or personal property, invest the same in securities authorized by law, pay the income thereof, after deducting all legal charges, to the person entitled thereto, and, upon the termination of the trust, account for and pay to the persons entitled thereto the corpus of the trust fund, or transfer and deliver to them the securities in which it is invested, as the court may direct, after deducting all legal charges thereon. Such trustee shall enter such security as the court may direct. He shall not be an insurer of the trust fund, and shall be liable to the persons interested in the income or corpus of the trust fund only for such care, prudence and diligence in the execution of the trust as other trustees are liable for.

NOTE.—This is Section 1 of the Act of May 17, 1871, P. L. 269, 1 Purd. 1133, amended by reason of the decision in *Weir's Estate*, 251 Pa. 499, also by inserting the provisions as to proceeds of real estate, and by omitting, at the end of the first sentence, the following: "and any married woman availing herself of the benefits of this act, shall have power, as a feme sole, to bind her separate estate and property by any obligation given by her, as security under this act." This provision seems unnecessary since the Married Women's Acts of 1887 and 1893, as it cannot be taken to mean that a married woman may bind herself as surety for another, but only that she may be principal in a bond given under the Act of 1871.

That part of Section 46 of the Act of February 24, 1834, 1 Purd. 1123, relating to security by a tenant for life on a sale of real estate for payment of debts, is covered.

Section 49 of the Act of 1834, 1 Purd. 1133, was supplied by the Act of 1871 and is recommended for repeal.

Section 1 of the Act of April 17, 1869, P. L. 70, 1 Purd. 1138, so far as it empowers "the owner of any contingent interest in the personal property of any decedent" to "require the legatee of any previous interest in the same property before receiving the same, to give security," etc., is embodied in the present draft.

The present law seems to require amendment in several particulars. It makes no provision for the case that frequently arises where the life tenant refuses or is unable to enter security; nor does it provide for the case that also frequently arises under existing laws where a widow, for example, is entitled for life to her share of the proceeds of real estate. In such cases it has been the practice for the courts *ex necessitate* to appoint a trustee without express legislative warrant. The duties of such a trustee were of course not defined by statute; and the Supreme Court has recently held in *Weir's Estate*, 251 Pa. 499, that such a trustee practically takes the place of the life tenant, who or whose estate under existing decisions is responsible to the remaindermen at the termination of the life estate for the exact value of the assets received by the life tenant, who thus becomes practically an insurer of the fund. In such circumstances it will be difficult to find any person or corporation who would be willing to assume this responsibility, and this section has been framed to assimilate the duties and responsibilities of such a trustee to those of other trustees.

"Section 23 of the Fiduciaries Act of June 7, 1917, P. L. 447, 489, has changed the rule laid down in *Weir's Estate* and expressly provides that, where a life tenant refuses or neglects to enter security, the court, upon the application of any person in interest, may appoint a trustee to hold the property, who shall be liable only 'for such care, prudence and diligence in the execution of the trust as other trustees are liable for': Mr. Justice MOSCHISKER, in *Loewer's Est.*, 263 Pa. 517, 106 Atl. 789, reversing on another point the court below (27 Dist. 753) where, in his opinion, LAMORELLE, P. J., said: "If, when a life tenant gives a bond, the security takes the place of the fund so awarded, and if, even where the life estate

is given in trust a similar rule applies, why should not a trustee appointed by the court be treated as is the surety, and be responsible for the fund at its value when received, irrespective of after-profits or losses? There is no warrant in law for the appointment of a trustee who is to be treated solely *qua* trustee. The Act of May 17, 1871, P. L. 269, is silent on the subject. True, it has been customary, where a life tenant was unwilling or unable to comply with the exaction of the act, to appoint some one to hold the fund and to act as trustee, but prior to the Fiduciaries Act of 1917, P. L. 447, there was no law authorizing the practice. . . .

"While no one seems to have questioned the right of the court to appoint such trustee, the responsibilities and the limitations of one so appointed were questioned and *are* defined in Weir's Estate, 251 Pa. 499." See also Conner's Est., 29 Dist. 636.

A gift of \$15,000 with a limitation or restriction as to its use, and a further bequest on the death of the legatee, comes within Section 23 of the Fiduciaries Act of June 7, 1917, P. L. 447, and will be delivered to the legatee upon giving security to protect the interest of the remaindermen. Dale's Est., 29 Dist. 265.

Where a testator devised a farm to his daughter for life subject to an annual payment to his widow during her life, and the farm was subsequently sold under order of court to pay a mortgage given for payment of debts, the court ordering an amount to remain charged out of the purchase money, the interest of which, being equal to her annuity, was to be paid to the widow for life, the court has no power, on petition of a subsequent purchaser of the farm, to order the daughter to give bond for, or to appoint a trustee to receive, the principal of the charge. The will created no charge and the former court had no authority to create one, nor can the present court authorize the payment to the daughter of money already due her or compel her to receive it. Refusal to accept money due is no wrong for which there is a remedy.

Semble. The 23d section of the Fiduciaries Act of June 7, 1917, P. L. 489, does not cover this case.

In dismissing the petition, the court, per SMITH, P. J., said: "Why should the petitioner be concerned about her giving a bond? It can be readily seen that the remaindermen might be disturbed if this money is not securely guarded, but it does not appear how the petitioner can be injured by paying as by the terms of the agreement it was contracted he should pay. There is nothing in the agreement about payment being withheld until the payee furnishes security. Again, what and where is the law by which a demand for security from Levina Garman can be enforced by anyone? As we understand the case, there was none previous to the passage of the Fiduciaries Act of June 7, 1917, Section 23, P. L. 447, and it can be fairly and forcefully argued that this act does not cover this case. It does not seem to authorize any other than executors, administrators with the will annexed, trustees under wills, or trustees appointed by the court, to withhold property from those to whom it has been bequeathed because of a failure or refusal by them to give security." Ranck's Est., 27 Dist. 792, 35 Lanc. Rev. 205.

470. REMEDY FOR COLLECTION OF ALL LEGACIES TO BE EXCLUSIVELY IN THE ORPHANS' COURT.

SECTION 24. The remedy for the collection or enforcement of payment or delivery of all legacies, whether pecuniary, specific or otherwise, and whether charged on land or not, shall hereafter be exclusively in the orphans' court, saving the jurisdiction of other courts in actions which may be pending at the time of the approval of this act.

NOTE.—This is a new section. To all intents and purposes, the remedy for the collection of legacies is now entirely in the orphans' court, actions at law for the purpose having fallen into disuse. The payment of legacies in general being essentially a part of the distribution of estates in the orphans' court, and that court having, under existing laws, full power to enforce the payment of legacies charged on land, it would seem proper to abolish proceedings in the court of common pleas.

The commissioners therefore suggest the repeal of Sections 50, 52, 53, 54, 55 and 56 of the Act of 1834, 1 Purd. 1134, 1135. Those sections were derived in part from the Act of March 21, 1772, 1 Sm. L. 383.

The Commissioners of 1830 recited the provision of Section 3 of the Act of 1772, which authorized the court in which an action for a legacy was brought to appoint auditors to ascertain how the accounts of the executor stood and how the assets ought to be apportioned, and remarked upon the great inconvenience of this method, saying: "The best course for all parties, is to refer all questions on the subject of accounts and assets, to the orphans' court, and to suspend proceedings in the other courts, until the result of the settlement in that tribunal is ascertained."

The present commissioners now recommend that the legislature take one step more and abolish the remedy by action at law.

This section of the Fiduciaries Act does not include owelty in partition, secured by recognizance in the orphans' court. In so holding, GILLAN, P. J., said:

"If the legislature had intended that the remedy for the collection of owelty in partition, charged by recognizance in the orphans' court, should be exclusively in that court, it would have said so; unless it does say so, the courts can not so hold. By Act of 24 February, 1834, P. L. 70 it was provided that it should be lawful for any one to whom a bequest of money was to be made, to bring an action at law for the recovery of the same. By the Act of 1917 this has been repealed and the remedy is now exclusively in the orphans' court. But this does not apply to owelty in partition charged upon lands." Poe's Est., 47 Pa. C. C. 590, 29 Dist. 857, 68 P. L. J. 635, 15 Del. 381.

471. PROCEDURE TO ENFORCE PAYMENT OF LEGACIES CHARGED ON LAND; PETITION, NOTICE DECREE FOR PAYMENT; SALE AND DISTRIBUTION OF PROCEEDS; DECREE TO ENFORCE PAYMENT OF INTEREST.

SECTION 25. (a) In all cases in which, by the provisions of any last will and testament, or by the provisions of this act, or by proceedings in the orphans' court in any county, any legacy or any money payable at a future period, or any money the interest on which is payable to any person, is or shall be hereafter charged upon, or payable out of real estate, it shall be lawful for the legatee or the person entitled to such money or interest to apply by petition to the orphans' court having jurisdiction of the accounts of the fiduciary. On the presentation of such petition, the court, having caused due notice to be given to such fiduciary, and the devisee or heir, as the case may be, and the present owner, of the real estate charged with such legacy, sum of money or interest, and to such persons interested in the estate or property as justice may require, may proceed according to equity to make a decree directing such devisee, heir or owner to pay the amount of such legacy, sum of money or interest then due, within a time to be limited by such decree, and providing that in case such devisee, heir or owner shall fail to make payment within such time, the fiduciary, or a trustee to be appointed by said court, in its discretion, shall, after giving public notice of such sale, once a week for a period of three weeks before the day appointed therefor, by advertisement, in at least one newspaper published in the county if there be one, or, if there be none, then in an adjoining county, and by handbills posted at a conspicuous place on the real estate proposed to be sold and in at least three of the most public places in the vicinity of such estate, make sale of said real estate or so much thereof as may be necessary, for the purpose of payment of such legacy, sum of money or interest. The proceeds of such sale shall be distributed, under the direction of said court, as in other cases of judicial sales, to the persons legally entitled to receive the same. In the case of money charged upon real estate, the interest on which is payable to any person, the court may, instead of directing a sale of such real estate as aforesaid, make such decree or order to enforce payment of said interest as shall be just and proper.

NOTE.—This is a combination of Section 59 of the Act of 1834, 1 Purd. 1135, Section 1 of the Act of May 17, 1866, P. L. 1096, 3 Purd. 3388, as

amended by the Act of March 22, 1907, P. L. 29, 6 Purd. 7036, and Section 1 of the Act of April 28, 1899, P. L. 120, 3 Purd. 3389.

Sections 59, 60 and 61 of the Act of 1834 were new in that act, and were intended "to remedy a serious defect in our jurisprudence, arising, like many others, from the attempt to obtain justice with the insufficient machinery of our common law courts," the remedy, before the Act of 1834, having been solely by actions at law.

Section 24 of the present draft (see 470 *supra*) makes the remedy in the orphans' court exclusive.

Section 59 of the Act of 1834 ends, "to make such decree or order touching the payment of the legacy, out of such real estate, as may be requisite and just." It has been held that the writ of *levari facias* is the proper process for enforcing such a decree: *Hart v. Homiller's Executor*, 23 Pa. 39. The change is made so as to provide for sale by the executor or a trustee, and the procedure is made to conform with sales for payment of debts. The provisions have also been extended so as to include the *terre tenant*. In line 6, "person" has been substituted for "widow," and corresponding changes have been made in this and the following clauses. "Once a week for a period of three weeks" has been substituted for "at least twenty days."

The Act of 1866 includes charges on land by proceedings in the orphans' court, and the amendment of 1907 added the words "or otherwise," which are now omitted. The Act of 1899 was intended to facilitate the collection of dower interest in cases of the absence or non-residence of the owners of the land.

Where a testator gives to his wife an annuity for life and directs that "the same shall be a lien upon any real estate of which I may die seized," and after giving the remainder of the income of his estate to certain persons for life, further directs that the corpus of his estate shall be divided among his grandchildren "subject to all the limitations, previous gifts, and bequests heretofore set forth," the widow, on a deficiency of income from the annuity, is entitled to proceed under the Act of February 24, 1834, P. L. 84 (incorporated under Section 25 of the Fiduciaries Act of June 7, 1917, P. L. 447), to have her annuity charged upon the land. *Johnston's Est.*, 264 Pa. 71, 107 Atl. 335.

472. PROCEDURE WHERE LAND LIES IN ANOTHER COUNTY OR IS DIVIDED BY A COUNTY LINE.

(b) If the real estate charged with such legacy, sum of money or interest shall be situated in a county or counties other than that the orphans' court of which has jurisdiction of the accounts of the fiduciary, and the devisee, heir or owner, against whom such decree has been made, shall fail to comply therewith according to the terms thereof, such decree may be certified to the orphans' court of any county in which such real estate is situated, or, in case such real estate is divided by a county line, then to the orphans' court

of the county where the mansion house may be situated, or, if there be no mansion house, to the county where the principal improvements may be, or, if there be no improvements, to either county. Upon such certification and petition filed by the legatee or the person entitled to such money or to such interest, it shall be the duty of the said orphans' court to make an order for the sale of so much and such parts of such real estate as shall, in their opinion, be necessary to raise the specified sum and to direct the fiduciary, or a trustee to be appointed by said court, to make such sale after public notice as aforesaid given in each of the counties in which the real estate is situated. Such fiduciary or trustee shall in all cases make return of his proceedings, in relation to such sale, to the orphans' court making such order of sale, when, if the same be approved by said court, it shall be confirmed; but the proceeds of such sale shall be distributed under the direction of the court having jurisdiction of the accounts of the fiduciary or trustee, as provided in clause (a) of this section. In the case of money charged upon real estate, the interest on which is payable to any person, the orphans' court to which the decree is certified, as aforesaid, may, instead of directing a sale of such real estate as aforesaid, make such decree or order to enforce payment of said interest as shall be just and proper.

NOTE.—This is Section 60 of the Act of 1834, 1 Purd. 1136, modified so as to correspond to the changes made in the last preceding clause, so as to provide for the filing of a petition by the legatee or other person entitled to payment, so as to include the case where the land is situated in other counties, and so as to make the procedure conform to that prescribed in relation to the sale of real estate for the payment of debts of a decedent.

473. BOND BY LEGATEE OR OTHER PERSON ENTITLED TO BENEFIT OF DECREE FOR PAYMENT.

(c) Before such legatee or other person shall be entitled to the benefit of any decree made under the provisions of this section for payment by the devisee, heir or owner of the real estate of the amount of such legacy, sum of money or interest, he or she shall give such security as the court, in which application was originally made, shall direct, for the indemnity of the devisee, heir, owner, or other persons interested, in the event of any debt due by the testator being recovered, for the payment of which such real estate would be liable.

NOTE.—This is Section 61 of the Act of 1834, 1 Purd. 1136, modified so as to apply only to the decree for payment.

474. DISCHARGE OF RESIDUARY ESTATE FROM ANNUITIES OR LEGACIES PAYABLE IN FUTURE,—PETITION.

SECTION 26. (a) Whenever any testator shall have heretofore, by his last will and testament duly proven, given or bequeathed any annuity or annuities to any person or persons, or directed the payment of an annuity or annuities by his executors or by trustees, or bequeathed legacies of principal sums payable at a future period, or upon contingencies or under other circumstances by which the payment or discharge and satisfaction of such legacies may be postponed, or may not take place until a distant period after the death of such testator, and either by the express words of the will, or by the rules of law in the construction thereof, such annuities or legacies are made or become a charge upon all the residuary real or personal estate of the testator, and whenever any testator shall hereafter make any such bequest and provisions, in any such case, it shall be lawful for the executors of any such will, or for any such annuitant or legatee, or for any person interested in such residuary estate, at any time after the expiration of six months from the granting of letters testamentary, to apply by petition to the orphans' court having jurisdiction of the accounts of such executors, setting forth the facts and praying relief.

NOTE.—This is the first part of Section 1 of the Act of February 23, 1853, P. L. 98, 1 Purd. 1136, the section having been divided on account of its excessive length.

The only changes made in this part are to substitute the period of six months for one year, and to add the words "real or personal" before "estate of the testator."

Section 26 of the Fiduciaries Act extended the practice provided under the Act of February 23, 1853 (P. L. 98), to residuary personal estate as well as real estate. *Gest, J., in Channon's Est.*, 27 Dist. 479, 47 Pa. C. C. 637, affirmed in 266 Pa. 417, 109 Atl. 756.

"A petition was presented by the Schuylkill Trust Company, executor of the last will and testament of John J. Cullen, praying that a citation be issued to show cause why the real estate of John J. Cullen, deceased, should not be sold for the purposes set forth in the petition. The seventh clause of the petition recites that 'in order to fully discharge the debts of the decedent and pay all bequests it is necessary to sell and dispose of the real estate,' and in paragraph ten, prays the court to grant relief, as provided for in the twenty-sixth section of the Fiduciaries Act of 1917. . . .

"The purpose of the second petition, as stated in clause seven, is to secure the discharge of the debts and bequests of the testator. It is alleged that this is a proceeding under the twenty-sixth section of the Fiduciaries Act of 1917. An examination of this section shows that it is a repetition of the Act of 1853, with slight modifications and it does not authorize the court to direct a sale of real estate for the payment of debts and legacies, or of either debts or legacies. In fine, it does not authorize the sale of real estate at all, and this court had no jurisdiction to order a sale of this real estate under this proceeding. And if the purchasers of real estate have any title it is an exceedingly doubtful one.

"The account shows that there was sufficient personal property in this estate to pay the debts. The executor should have contented itself with the administration of the personal estate, and thus its duty as executor would have been fully discharged. The will did not charge the land with the payment of legacies; but if it did, the executor was not the proper person to petition the court to secure their payment." WILHELM, P. J., in Cullen's Est., 16 Sch. 278.

475. CITATION, HEARING, APPOINTMENT OF MASTER.

(b) Upon the filing of such petition, the court may order a citation to be issued to the parties interested, to appear at a day certain, to show cause why the relief prayed for should not be granted; and upon the return of such citation, if all the annuitants, legatees and other persons interested shall have had due notice of the application, the court may itself inquire into the circumstances, the amount and condition of the estate, and the expediency and propriety of exempting any part or portion of the residuary real or personal estate from the lien and charge of such annuities and legacies, or either of them, having due regard to the absolute and ultimate security of such annuities and legacies; or the court may, at its discretion, refer the case to a master, with directions to inquire into the matters aforesaid and to report thereupon.

NOTE.—This is the second part of Section 1 of the Act of February 23, 1853, P. L. 98, 1 Purd. 1137, altered by extending its provisions to residuary personal as well as real estate, and by providing that the case may be referred to a master instead of an auditor.

476. DECREE DIRECTING SETTING APART OR INVESTING OF SO MUCH OF RESIDUARY ESTATE AS WILL SECURE PAYMENT OF ANNUITIES OF LEGACIES.

(c) After such inquiry by the court or, if the case is referred to a master, after his report has been made and after notice thereof to all persons interested, it shall be lawful for the court to make

a decree in the premises, and if it shall appear that all the debts of the testator have been paid or sufficiently secured, the court may enter a decree that such part or parts of the residuary real estate, or such real securities or investments in public stocks or bonds, or such securities as now are or may hereafter be authorized by law as investments by trustees, shall be set apart or appropriated or that such part of the residuary estate shall be so invested as, in the judgment of the court, shall appear to be, and with reasonable probability continue to be, adequate and sufficient, beyond all charges, expenses and deductions, for the payment of such annuities and legacies, providing always a sufficient surplus to meet any contingent diminution or depreciation in the value or income of the estate and securities so set apart.

NOTE.—This is the third part of Section 1 of the Act of February 23, 1853, 1 Purd. 1137.

It has been changed by inserting the provisions at the beginning, to cover cases where the court itself hears the evidence; by inserting after "public stocks" the words "or bonds;" by adding the provision as to other legal investments; and by adding the provision for investment, to cover cases where the residuary estate consists of other than legal investments. There are also slight changes in phraseology.

477. DISCHARGE OF REMAINING ESTATE; APPEALS.

(d) When such decree shall have been made, it shall be further lawful for the court to order and decree that all the remaining real or personal estate of the testator, or both, not so specifically set apart, shall be and remain discharged and exonerated from the lien and charge of any and every such annuity and legacy, and such decree shall have the force and effect of discharging and exonerating all such real or personal estate, or both, accordingly: *Provided*, That an appeal from a decree granting or refusing such petition may be taken to the proper appellate court within six months after the entry of the same, as in other cases: *And provided further*, That nothing in this section contained shall be deemed or held to authorize the exoneration of any real estate which may have been or may be specifically charged by a testator with the payment of any annuity or legacy.

NOTE.—This is the last part of Section 1 of the Act of February 23, 1853, 1 Purd. 1137.

The words "or personal" have been inserted in the third line. After "annuity and legacy," in the sixth line, the following has been omitted: "in the hands of any bona fide purchaser of such real estate for a valuable

consideration." No reason appears why the exoneration should not operate in favor of devisees and legatees.

The provision as to appeal has been changed so as to meet the decision in McCredy's Appeal, 64 Pa. 428, that an appeal under this section lay only when the decree was in favor of the petitioner. The words "proper appellate" have been substituted for "supreme" in the first proviso, and the period for appeal has been made six months instead of one year.

478. CUSTODY OF PORTION OF ESTATE SET APART; ACCOUNTS, SURPLUS INCOME.

(c) The real estate, securities and investments, set apart and appropriated by order of the court as aforesaid, shall be and continue in the possession, charge and management of the executors, trustees or other persons to whom the same may have been devised or bequeathed by the testator as aforesaid, under and subject to the charge of such annuities and legacies. It shall be the duty of every such executor, trustee and other person, upon request of any person interested, to file with said court, at the expiration of one year after such decree shall have been made, and at the expiration of every year thereafter until the termination of such trust, an account setting forth the situation and circumstances of such estate, securities and investments, and the annual income therefrom, and the payments thereout. If, upon such account, it shall appear to the court that the said income exceeds, in any considerable degree, the amount of the existing annuities and other charges and expenses payable thereout, it shall be lawful for the court to order and decree that such surplus income may be paid over to such persons as may be entitled to the residuary estate under the provisions of the will, or the court may, in their discretion, order and decree that the same be invested in real securities, public stocks or bonds, or such securities as now are or may hereafter be authorized by law as investments by trustees, for the further or additional security of such annuitants or legatees.

NOTE.—This is Section 2 of the Act of February 23, 1853, P. L. 98, 1 Purd. 1137, changed by inserting "investments" instead of "stocks or bonds" in the first line and in corresponding places; by changing "make report to the court" to "file with said court;" by providing that the accounts shall be filed at the request of any person interested; and by inserting at the end "or such securities as now are or may hereafter be authorized by law as investments by trustees."

479. REDUCTION OF FUND SET APART.

(f) Upon the application of any person interested in any residuary estate, set apart as aforesaid, setting forth that, by reason of the decease of any such annuitant, or by the happening of any

other event, the charge of any annuity or legacy as aforesaid has become extinguished, in fact or law, it shall be lawful for the said court, from time to time, after due notice and inquiry into the facts, to make an order and decree for the exoneration and discharge of such part or portion or so much of the real estate, securities and investments, so set apart and appropriated, as may appear to such court to be beyond the amount requisite or proper for the purpose of providing a sufficient continuing security for the payment of the remaining annuities and legacies. Every such order or decree shall have the same force and effect in respect to the real estate, securities and investments, therein and thereby exonerated and discharged, as is declared in clause (d) of this section, in respect to the residuary estate not specifically set apart and appropriated. An appeal from the entry of or refusal to enter such order or decree may be taken to the proper appellate court within six months, as in other cases.

NOTE.—This is Section 3 of the Act of February 23, 1853, 1 Purd. 1137, the phraseology being altered to conform to clause (e), and the last sentence being added to correspond to clause (d).

480. RIGHTS TO ULTIMATE ENJOYMENT OF RESIDUARY ESTATE SET APART NOT TO BE AFFECTED.

(g) Nothing in this section contained, or in any decree or order made by any orphans' court by the authority of this section, shall be deemed or held to affect in any way the legal or equitable rights of any person or persons interested in the residuary estate set apart and appropriated as aforesaid, but all such rights to the ultimate enjoyment of such estate shall remain and continue as before the passage of this act, so far as the provisions of this section are concerned.

NOTE.—This is Section 4 of the Act of February 23, 1853, 1 Purd. 1138. The changes are the substitution of "section" for "act" in the first and third lines, and the addition, at the end, of the words "so far as the provisions of this section are concerned."

481. DISCHARGE OF REAL ESTATE FROM LIEN OF LEGACIES AND OTHER CHARGES,—WHERE PERSONS TO WHOM PAYMENT IS DUE CANNOT BE FOUND,—JURISDICTION; PETITION AND NOTICE.

SECTION 27. (a) 1. In all cases in which, under any proceeding in any orphans' court of this commonwealth, or by any last will

and testament, or by the provisions of this act, any dower, legacy, recognizance or other charge shall have been imposed upon land, or any part thereof, and such charge is due and payable, and the person or persons to whom such payment is due cannot be found after diligent and reasonable search, it shall be lawful for the owner of the land charged to apply by petition to the orphans' court of the county where said land is situated, or, in case said land is divided by a county line, to the orphans' court of the county where the mansion house may be situated, or, if there be no mansion house, in the county where the principal improvements may be, or, if there be no improvements, in either county, setting forth the circumstances of the case, the name or names of the person or persons to whom such payment is due or the fact that such names are unknown, and the time when such legacy or charge, or any part thereof, became due and payable, and a description of the land subject to the charge. Thereupon said court shall make an order directing such petitioner to give public notice of the facts set forth in such petition, by publication once a week for four successive weeks in one or more newspapers published within or nearest to said county or within or nearest to each of said counties, requiring the person or persons to whom such legacy or charge, or any part thereof, is due and payable, or who wish to lay claim to the moneys as aforesaid, to appear in court on a day designated, not less than twenty days after the last publication of said notice, and show cause why the amount so due and payable, as set forth in said petition, should not be paid into said court.

NOTE.—This is the first part of Section 1 of the Act of July 14, 1897, P. L. 269, 3 Purd. 3388, condensed by omitting unnecessary repetitions. The first part has been changed so as to be uniform with clause (b) 1 of this section. Provision has been made for cases where the land is divided by a county line; and the provisions for notice have been modified by requiring publication for four weeks and appearance not less than twenty days after the last publication, instead of publication for three weeks before the first day of the next term of court and appearance at the next term.

482. HEARINGS; ASCERTAINMENT OF AMOUNT OF CHARGE; PAYMENT INTO COURT; RECORDING OF DECREE.

2. If no person shall appear to show cause, as aforesaid, or if the person or persons appearing shall fail to show that he or they are entitled to such moneys, the court, being satisfied of the truth of the facts set forth in said petition, shall enter a decree that the

amount of such legacy or charge, or part thereof, due and payable to the time of final decree, be paid into court, and that, upon such payment, such real estate shall be discharged from the lien of such legacy or charge, or from so much thereof as shall be so paid into court. When the amount of such legacy or other charge does not appear as a matter of record, the court may, by appointment of a master or by investigation in open court, ascertain and fix such amount. A certified copy of such decree may be recorded in the deed book in the office for recording deeds in every county where such real estate or any part thereof is situated, in the same manner and with like effect as deeds of conveyance of real estate, are recorded, and shall be indexed by the recorder in the grantors' index under the name of the decedent and in the grantees' index under the name of the owner of the land; and the charges for recording shall be the same as are provided by law for similar services.

NOTE.—This is the remainder of Section 1 of the Act of July 14, 1897, 3 Purd. 3388, condensed in the same manner as the first part, and modified as to the decree and recording so as to follow the provisions of the Act of 1861, clause (c) of this section.

483. WHERE CHARGE HAS BEEN PAID, OR IS PRESUMED TO BE PAID,—JURISDICTION.

(b) 1. In all cases in which, under any proceeding in any orphans' court of this commonwealth, or by any last will and testament, or by the provisions of this act, any dower, legacy, recognizance, or other charge shall have been imposed upon land, payable presently or at a future time, and such charge shall have been paid, or a period of twenty years shall have elapsed after the principal of such charge has become due and payable and no payment shall have been made within such period on account of such charge by the owner or owners of the land, and no sufficient satisfaction, release, acquittance or acknowledgment of payment thereof shall be of record in the county in which the land is situated, it shall be lawful for the orphans' court of said county, or, in case said land is divided by a county line, then the orphans' court of the county where the mansion house may be situated, or, if there be no mansion house, in the county where the principal improvements may be, or, if there be no improvements, in either county, to entertain a petition for the discharge of said land from the lien of said charge.

NOTE.—This is the first part of Section 1 of the Act of May 8, 1895, P. L. 44, 4 Purd. 4047, altered so as to apply only to charges enforceable in the orphans' court. The section as it now stands includes encumbrances and charges enforceable in the common pleas.

This part of the section has been modified so as to include legacies and other charges, and thus supply Section 1 of the Act of June 8, 1893, P. L. 356, 4 Purd. 4046. The period has been made twenty years, which is the ordinary period for presumption of payment, instead of twenty-one years.

The section in the Act of 1895 is very long and consists of one sentence. It is here subdivided for the sake of clearness.

Where, on a petition under Section 27 (b) of the Fiduciaries Act of 1917, P. L. 447, for the discharge of land from a dower fund, the weight of the evidence showed that the fund in question was paid to the parties thereto entitled more than twenty-eight years before the hearing of the case, and in the opinion of the court was sufficient to establish this fact, a decree discharging the land from the fund was entered. Harbold's Est., 34 York 149.

484. PETITION.

2. Such petition shall be presented by the owner or owners of said land or any part thereof, shall be duly verified by affidavit, and shall set forth the facts and allege that said charge has been paid or that no payment of principal or interest has been made within said period of twenty years on account of said charge by the present owner or owners, or, so far as can be ascertained, by his or their predecessors in title, and shall state the names of all known parties interested in such charge, their places of residence, if known, and a description of the lands subject to the charge and sought to be released and discharged.

NOTE.—This is the second part of Section 1 of the Act of May 8, 1895, P. L. 44, 4 Purd. 4047.

485. CITATION.

3. Upon the presentation of such petition, it shall be lawful for said court to issue a citation in the manner authorized by law to all such parties, which citation shall be served as other citations are required to be served, and shall require the parties to appear in court on a day designated, to show cause why said land should not be discharged from the lien of such dower, legacy or other charge.

NOTE.—This is substituted for the provisions of Section 1 of the Act of May 8, 1895, P. L. 44, 4 Purd. 4047, as to service of notice and publication thereof in newspapers.

486. HEARING, DECREE, RECORDING OF DECREE.

4. If the court, aided if necessary by the report of a master, shall determine, at a hearing held in pursuance of said citation, that such dower, legacy or other charge has been paid or is otherwise no longer chargeable upon the land by reason of any presumption of payment, or if no person shall appear to answer the citation, or if all parties in interest shall have joined in the petition upon which such citation was issued, the court, being satisfied of the truth of the allegations of the petition, shall decree that the land subject to the charge, or any part thereof, sought to be released or discharged, shall be released and discharged from the same and the payment thereof; and a certified copy of such decree may be recorded in the office for recording deeds in each county where such land or any part thereof is situated, upon the terms and with the effect provided in clause (a), paragraph 2 of this section.

NOTE.—This is the last part of Section 1 of the Act of May 8, 1895, 4 Purd. 4047, altered so as to conform to the changes made in the previous parts of the section, and so as to provide for determination of the questions in the same proceeding instead of requiring the persons claiming payment to institute another proceeding to enforce payment.

Section 2 of the Act of 1895, 4 Purd. 4048, provides for the appointment of guardians ad litem, and is omitted as unnecessary in view of the general provisions of Section 59 (k) of the present draft. (See 616 *infra*.)

487. CASES NOT PROVIDED FOR IN CLAUSES (A) AND (B).

(c) Whenever any dower, legacy, recognizance or other charge has been or shall be charged upon or payable out of real estate, by virtue of any last will and testament, by the provisions of this act, or under any proceeding in any orphans' court of this commonwealth, or whenever it shall be claimed that such charge exists, it shall be lawful for said court, in any case not provided for by the preceding clauses of this section, on petition of the devisee or heir of such real estate, or any owner thereof, claiming under such devisee or heir, to authorize such petitioner to pay into said court the full amount of such legacy or other charge; whereupon the said court shall make a decree, discharging such real estate from the lien of such legacy or other charge, or from so much thereof as shall be so paid into court; and a certified copy of such decree may be recorded in the office for recording deeds in any county where such land or any part thereof is situated, upon the terms

and with the effect provided in clause (a), paragraph 2 of this section.

NOTE.—This is Section 1 of the Act of May 1, 1861, P. L. 420, 1 Purd. 1136, modified so as to cover all cases not provided for by the preceding clauses of the present section of the draft, and with some changes in phraseology.

Section 2 of the Act of May 17, 1866, P. L. 1096, 3 Purd. 3388, is covered by the provisions of this and the preceding clauses, and is therefore recommended for repeal.

Sections 22 and 23 of the Act of April 26, 1850, P. L. 581, 3 Purd. 3436, extending to legacies charged on land the provisions of Section 1 of the Act of March 31, 1823, P. L. 216, relating to the satisfaction of mortgages, are recommended for repeal, the matter being sufficiently covered by the present section of this draft.

The Fiduciaries Act of June 7, 1917, P. L. 447, does not give the orphans' court exclusive jurisdiction of the remedy for the collection of owelty of partition, charged by recognizance in the orphans' court, and the jurisdiction of the court of common pleas is still concurrent in such case.

"It will be observed that clause (c) of Section 27, above mentioned, provides that whenever any dower, legacy, recognizance, or any other charge shall be charged upon or payable out of real estate by virtue of any last will and testament by the provisions of this act, or any proceeding in any orphans' court of this commonwealth, * * * it shall be lawful for said court, * * * on the petition of a devisee or heir, to authorize such petitioner or debtor to pay into court the full amount of such legacy or charge, etc. Nowhere is it provided that this shall be the exclusive method of procedure. It is true that the Act of June 7, 1917, above cited, repeals the Act of May 17, 1866, P. L. 1096, which provided a method of procedure in the orphans' court on a recognizance such as this. The procedure by *sci. fa.* in the common pleas upon a recognizance entered in the orphans' court has been so long practiced and approved by the courts in this state that it will take a positive act of assembly to destroy that remedy * * * If the legislature had intended that the remedy for the collection of owelty in partition charged by recognizance in the orphans' court should be exclusively in that court, it would have said so; unless it does say so, the court cannot so hold." GILLAN, P. J., in Poe's Est., 47 Pa. C. C. 590, 29 Dist. 857, 68 P. L. J. 635, 15 Del. 381.

488. DISTRIBUTION OF MONEYS PAID INTO COURT.

(d) All moneys, when paid into court under the provisions of any of the preceding clauses of this section, shall remain therein until the legatee or other person claiming the same shall present a petition for the distribution thereof, whereupon the court shall, after due notice to all parties interested, make distribution of said moneys to the persons legally entitled to receive the same, or may,

in its discretion, appoint an auditor for the purpose of making such distribution.

NOTE.—This is a combination of Section 2 of the Act of May 1, 1861, P. L. 420, 1 Purd. 1136, and Section 2 of the Act of July 14, 1897, P. L. 269, 3 Purd. 3389. The provision for appointment of an auditor is derived from Section 2 of the Act of May 17, 1866, P. L. 1096, 3 Purd. 3388, but the appointment is made discretionary.

The Act of 1861 provides that distribution shall be made "in the manner provided for the distribution of the proceeds of sheriff's sales, when paid into court and directed to be paid out."

See Poe's Est., 47 Pa. C. C. 590, 29 Dist. 857, 68 P. L. J. 635, 15 Del. 381.

489. PAYMENT OF COSTS.

(e) All costs of proceedings under the provisions of any of the clauses of this section shall be paid as may be directed by the court.

NOTE.—This is substituted for Section 3 of the Act of 1895, 4 Purd. 4048, which provides that the costs of proceedings on petitions presented under the act shall be paid by the petitioners, but that the costs of proceedings instituted in response to orders under the provisions of the act shall abide the decision of such proceedings.

Section 4 of the Act of 1895 is a general repealing clause, with a proviso that the act "shall not apply to any proceedings now pending, but the same may be proceeded with under existing laws to final decree."

490. APPEALS.

(f) Any party aggrieved by any definitive order or decree entered by the court under any of the provisions of this section may appeal from such order or decree to the proper appellate court as in other cases.

NOTE.—This is a new clause, introduced in order to remove any possible doubt as to the right of appeal. Some of the existing acts, such as Section 1 of the Act of May 8, 1895, 4 Purd. 4048, contain provisions that the decree "shall forever thereafter operate as a release and discharge of the land from the incumbrance of the charge and shall bar all actions brought thereon," without making any provision for an appeal.

491. POWERS OF EXECUTORS AS TO REAL ESTATE,—MERE AUTHORITY TO SELL THE SAME AS A DEVISE TO SELL.

SECTION 28. (a) The executors of the last will of any decedent, to whom is given thereby a naked authority only to sell any real estate, shall take and hold the same interests therein, and have the

same power and authorities over such estate for all purposes of sale and conveyance, and also of remedy by entry, by action or otherwise, as if the same had been thereby devised to them to be sold, saving always, to every testator, the right to direct otherwise.

NOTE.—This is Section 13 of the Act of 1834, 1 Purd. 1099, which corresponded to Section 14 of the Commissioners' Draft. It was derived substantially from Section 4 of the Act of March 31, 1792, 3 Sm. L. 66.

"The auditing judge is of the opinion that the power to carry out the charitable purpose is not confined alone to the first named executor. It is true that in conferring this power the testator speaks of 'my executor,' using the singular number, but this the testator does because he appoints one person sole executor, and when he later appoints succeeding executors in the event of the original executor's death, etc., his apparent purpose is that, in any event, there shall be some one in the office of executor who, by virtue of their office, shall have the duty of carrying out this provision of the will as well as the duty of performing the other services required of executors. See, generally, *Kershaw's Estate*, 27 Dist. R. 659; *Murphy's Estate*, 184 Pa. 310; *Sheet's Estate*, 215 Pa. 164; *Fiduciaries Act of June 7, 1917*, Secs. 28 and 56, P. L. 447." THOMPSON, J. (Adjudication), *Barnwell's Est.*, 49 Pa. C. C. 188, 29 Dist. 317, *aff'd.* in 269 Pa. 443.

A died leaving a will wherein the executor was directed to pay the debts and funeral expenses, and a devise was made of \$50 to a cemetery company. The rest and residue of his property, real, personal and mixed, was given to his wife and to her heirs. The last clause of the will gave the executor full power and authority to dispose of the real estate "as may be for the best interest of my estate." It was agreed that the personal estate was sufficient to pay the debts, funeral expenses, the devise to the cemetery company, costs of administration and taxes. The executor sold the real estate at a public sale, and defendant paid some down money, and subsequently defendant refused to pay the balance or to take title on the ground that the executor could not convey a marketable title. *Held*, as the personal estate was sufficient to pay the items mentioned, there was no occasion for a sale of the real estate; that the power to sell did not operate as a conversion, and there was nothing in the will to show that the testator intended that there should be a sale for the purpose of distribution, and that, therefore, judgment should be entered for the defendant.

"It will be observed that there is no direction to the executor to sell. His power of sale is 'as may be for the best interest of my estate.' Such power does not operate as a conversion. In *Chew v. Nicklin*, 45 Pa. 84, the syllabus is: 'Conversion is a question of intention; and to effect it by will, the direction to convert therein must be positive and explicit. A bare power to sell, given to executors by will, does not operate as a conversion. The Act of Feb. 24, 1834, P. L. 70, was not intended to break descents or work a conversion of real estate over which a naked power of sale had been given to executors, but only to enable them to preserve and dispose of the estate as though an interest had been devised to them instead, leav-

ing the question of intention to convert to depend upon the will of the testator.' Testator died after the passage of the Fiduciaries Act of June 7, 1917, P. L. 447, but the 28th section of that act is an exact copy of the Act of 1834, referred to above. The above case was followed in *Hunt's and Lehman's Appeals*, 105 Pa. 128." STEWART, P. J., in *Kolb v. O'Hay*, 28 Dist. 194, 16 North. 289.

Testatrix after disposing of her household personal property devised all the rest, residue and remainder of her estate, real, personal and mixed, "to all my children, share and share alike, and to their heirs and assigns forever," and in the next clause appointed a son and daughter as executors giving them authority "to execute deed for my property." *Held*, (1) the gift in the residuary clause was an absolute gift to the testatrix's children not cut down or abrogated by the "authority to execute deed" subsequently granted to her executors, and (2) the executors cannot alone convey a good marketable title in fee simple to testatrix's real estate. ENDLICH, P. J., held: "The question involved in this case stated arises upon the will of Elizabeth Eisenbise, who was the owner of the house and lot No. 311 North Front Street, in the city of Reading, and who died August 31, 1920, leaving a will. In it, after bequeathing to her daughter, Annie Eisenbise, all her 'household furniture and personal property' (i. e., all her household personal property), the testatrix proceeds as follows:

"'As to all the rest, residue and remainder of my estate, real, personal and mixed, I give, devise and bequeath to all my children share and share alike, and to their heirs and assigns forever.

"'I hereby appoint my son, Peter W. Eisenbise, and my daughter, Annie, to be the executors of this, my last will and testament, and give them authority to execute deed for my property.'

"The first of these clauses clearly imports an absolute gift to the testatrix's children. Such a gift, it is settled by many decisions, is not to be treated as cut down or abrogated by a subsequent provision not equally clearly and necessarily manifesting a purpose so to do: *Hiestand v. Meyer*, 150 Pa. 501, 505; *Yost v. Ins. Co.*, 179 id. 381; *Ault v. Karch*, 220 Id. 366; *Moyer v. Rentschler*, 231 Id., 620, 622; *Pattin v. Scott*, 270 Id. 49, 51. Here the absolute gift to the children is followed by an 'authority to execute deed' for the testatrix's property. Such a provision may vest in the executors the estate in the land as fully as if it were devised to them to be sold: *Shippen's Adm'r. v. Clapp*, 36 Pa. 89. The Fiduciaries Act 7 June, 1917, Section 28 (a), P. L. 497 provides that:

"'The executors of the last will of any decedent, to whom is given thereby a naked authority only to sell any real estate, shall take and hold the same interests therein, and have the same power and authorities over, such estate for all purposes of sale and conveyance and also of remedy by entry, by action, or otherwise, as if the same had been thereby devised to them to be sold, saving always to every testator the right to direct otherwise.'

"The power thus created, however, is one which, in the absence of express direction to sell, arises by implication from a confusion of realty and personalty, in the testator's direction to his executors to convert and

distribute: see *Myers' App.* 62 Pa. 104, 107; *Gray v. Henderson*, 71 Id. 368, and therefore can hardly be regarded as standing upon the same plane with the preceding gift to the children in point of clearness, necessity and absoluteness. Manifestly, where a testator makes a provision contrary to the effect of the statute and fails to supersede it by another capable of overcoming it, he must be deemed to 'direct otherwise' within the meaning of the enactment above quoted.

"Our conclusion is that the later direction does not abrogate the preceding one; that under the will of Elizabeth Eisenbise, the plaintiffs, executors, could not alone convey a good marketable title in fee simple to said premises to the defendants; and that therefore—

"Under the case stated, judgment is to be entered for the defendants and against the plaintiffs for the sum of \$400, with interest from October 21, 1920, and costs of suit." *Eisenbise's Executors v. Lebo*, 13 Berks 308.

492. PRIVATE SALES, CONVEYANCES OR LEASES AUTHORIZED.

(b) All powers to sell or let real estate on ground rent, contained in any will, shall be deemed and taken to authorize sales, conveyances or leases, either public or private, unless expressly restricted by the said instrument to one or the other mode.

NOTE.—This is a part of Section 1 of the Act of March 14, 1849, P. L. 164, 4 *Purd.* 4924. After "any will," the words "hereafter executed" are omitted. The remainder of the section relates to powers contained in deeds or other instruments and to private sales or leases made before the passage of the act.

Section 2 of the Act of March 14, 1850, P. L. 195, 1 *Purd.* 376, also validated private sales and leases theretofore made.

493. POWERS NOT GIVEN TO ANY PERSON BY NAME OR DESCRIPTION DEEMED TO BE GIVEN TO EXECUTORS, BUT TO BE EXERCISED UNDER CONTROL OF THE ORPHANS' COURT.

(c) All powers, authorities and directions, relating to real estate, contained in any last will, and not given to any person by name or by description, shall be deemed to have been given to the executors thereof; but no such power, authority or direction shall be exercised or carried into effect by them, except under the control and direction of the orphans' court having jurisdiction of their accounts, and after the entry of security if the court shall so direct.

NOTE.—This is Section 12 of the Act of February 24, 1834, P. L. 73, 1 *Purd.* 1098, which corresponded to Section 13 of the Commissioners' Draft. This, and the two following sections of that draft, were digested from the Acts of March 31, 1792, Section 4, 3 *Sm. L.* 66, and March 12, 1800, 3 *Sm. L.* 433.

The previous law was stated in *Lloyd v. Taylor*, 2 Dallas 223, 1 Yeates 422.

The words at the end, beginning with "and after the entry" are new.

The orphans' court has no jurisdiction under this section of the Fiduciaries Act to grant an order of sale of real estate when the testator merely provides that he requests his estate to be divided in equal shares between his children living; and further provides that the executor shall collect all his accounts and other specific personal property and divide the same. *Faus' Est.*, 50 Pa. C. C. 342.

494. POWERS OF SURVIVING, ACTING, OR REMAINING EXECUTORS, OR ADMINISTRATORS C. T. A. AS TO REAL ESTATE.

(d) In all cases wherein testators shall have devised their real estate, or any part thereof, to their executors to be sold, or shall have authorized or directed such executors to sell and convey such real estate, or shall have directed such real estate to be sold without naming or declaring who shall sell the same, if one or more of such executors shall die, refuse, renounce, or be dismissed or discharged, it shall be lawful for the surviving, acting or remaining executor or executors, or for the administrator or administrators with the will annexed, if such there be, to bring action for the recovery of possession of such real estate, and against trespassers thereon, to sell and convey such real estate, or manage the same for the benefit of the persons interested therein, and otherwise act respecting the same, as fully and completely as he or they, together with such dying, refusing, renouncing, dismissed or discharged co-executor or co-executors, would be empowered to do, if there had been no death, refusal, renunciation, dismissal or discharge, or, in the case of an administrator with the will annexed, as fully and amply as if all the executors named in the will had joined therein: *Provided*, That nothing in this clause shall be deemed or taken to prevent any testator from directing, by his last will and testament, otherwise than is herein declared and enacted.

NOTE.—This is a combination of the provisions of Sections 1 to 5, inclusive, of the Act of March 12, 1800, 3 Sm. L. 433, 1 Purd. 1097-1098.

It is recommended that this be substituted for Section 14 of the Act of 1834, 1 Purd. 1099, which was derived from the Act of 1800, but is not so complete.

It would seem that, in spite of the Act of 1834, the Act of 1800 is now in force. See Section 8 of the Act of April 22, 1856, P. L. 532; *Ross v. Barclay*, 18 Pa. 179; *Bell's Appeal*, 66 Pa. 498.

495. FIDUCIARIES MAY MAKE CONVEYANCE THROUGH ATTORNEYS.

SECTION 29. Any fiduciary with power to convey lands or tenements in this commonwealth, may make conveyance under such power by and through an attorney or attorneys duly constituted, and such conveyances shall be of the same validity as if executed personally by the constituent; and all conveyances so heretofore bona fide made by such fiduciaries are hereby confirmed: *Provided*, That nothing herein contained shall authorize any fiduciary to delegate to others the discretion vested in himself for the general management of his trust.

NOTE.—This is Section 1 of the Act of March 14, 1850, P. L. 195, 1 Purd. 376, except that “fiduciary” has been substituted for “trustee, executor or other persons acting in a fiduciary character.”

This section of the Act of 1850 seems to apply to other fiduciaries than those included in the present act, and should not be generally repealed. Section 2 of the Act of 1850, 1 Purd. 376, relates to the authority of agents or attorneys in fact, and does not belong in the present act.

496. PURCHASERS OF REAL ESTATE FROM EXECUTORS OR TRUSTEES NOT BOUND TO SEE TO THE APPLICATION OF THE PURCHASE MONEY.

SECTION 30. Whenever any person seized of real estate situated in this commonwealth has died or shall die, having first made and published his last will and testament, wherein said real estate is devised to executors or trustees named therein in trust to make sale thereof, or wherein the sale of real estate is authorized or directed but no person is designated to make such sale, and the executors have complied with the provisions of Section 28, clause (c), of this act, or wherein said executors or trustees are authorized to make sale of said real estate, convert the same into money, and distribute the proceeds of such sale or sales, or any part thereof, or hold the same in trust for any particular purpose, or for the use of any particular person or persons named in said last will and testament, the person or persons purchasing the real estate so sold from the executors or trustees named in said last will and testament, under the power of sale or direction to sell contained therein, shall take title thereto free and discharged of any obligation to see to the application of the purchase money.

NOTE.—This is Section 1 of the Act of June 10, 1911, P. L. 874, 7 Purd. 7703. Section 2 of that act is merely a repealer.

The changes are, to make the section include cases where sale is authorized or directed but no one is designated to make the sale, and cases where the sale is merely for the purpose of distribution.

So far as sales under testamentary powers are concerned, Section 19 of the Act of February 24, 1834, 1 Purd. 1122, providing for payment of purchase money into court, is superseded by the Act of 1911, and is now recommended for repeal.

Section 30 of the Fiduciaries Act of June 7, 1917, P. L. 447, makes no change in the law as it previously existed with respect to the lien of general debts against a decedent's real estate where a discretionary power to sell is given as mentioned in the act.

It was not the intention of this section to change the course of devolution nor to break the current of descent by holding that a conversation took place from the moment of the testator's death, under a mere authority in the will to sell realty.

Nor did it intend to take away from general creditors the land as security for the payment of debts. It still remained such security and the lien of general debts attach thereto, but such debts will be discharged not only by judicial sale, but also by sale under the discretionary power of sale contained in the will.

"Since the passage of the Act of 1917, if the sale related back to the date of testator's death, these debts would not be liens on the real estate; yet the land has passed as land. There was no conversion, and, while all the property of the testator was liable for the testator's debts, the real estate was only liable within the year, unless the claim had been duly indexed and suit brought; but if the Act of 1917 intended to wipe out the line of general debts on real estate and another act states that such debts can be collected from funds derived from the sale of such real estate, only as such debts are proceeded on in a certain way, as we have indicated, we are legislating land away from the reach of creditors when we hold that the lien act cannot be put in operation because general debts are not liens under the Act of 1917, and we close the door against recovering these debts from the real estate of the testator; except possibly as the executor might within the year petition for an order of sale for the payment of debts. To prevent such an inequitable conclusion, so much out of harmony with all the law, we follow Judge BELL's advice in *Cadbury v. Duval*, 10 Pa. 265, 270: 'Legislative enactments are to be expounded as near to the use and reason of the prior law as may be, when this can be done without violation of its obvious meaning; for, say the cases, it is not to be presumed the legislature intended to make any innovation upon the common law, further than the case absolutely requires.'

"From an examination of the will before us, it apparently comes within the terms of Section 30. Not only is there an authority to convert to sell, but also a direction to pay debts. This is nothing less than an authority to convert into money and distribute. The will also directs the executrix to pay 'to my father and mother * * * jointly, and after the death of either to the survivor, the sum of seventy-five dollars each and every month,' the sum necessary for this purpose, if computed on an interest-bearing investment, would exceed the purchase price named in the con-

tract of sale. The money, therefore, would be held 'in trust * * * for the use of any person' named in the last will and testament. It follows, therefore, that the sale by the executrix would be made under a will controlled by this act. The purchaser not being required to see to the application of the proceeds of sale would take the property free of the lien of general debts: *Piper v. Doran*, (164 Pa. 430); and, with the explanation here given, the judgment of the court below is affirmed." *KEPHART, J.*, in *Davidson v Bright*, 267 Pa. 580, 110 Atl. 301.

497. LEASES OF REAL ESTATE BY TESTAMENTARY TRUSTEES AND GUARDIANS.

SECTION 31. Unless it be otherwise provided by the will, any testamentary trustee shall have power to make a lease of real estate included in the trust for a term not exceeding five years, and any guardian shall have power to make a lease of real estate belonging to his ward for a term not exceeding five years that shall expire before the minor, if living, would attain his majority. If any testamentary trustee or guardian shall deem it advisable to make such lease for a longer period than aforesaid, the orphans' court of the county wherein such real estate shall be situated, on the application of such trustee or guardian, being aided where necessary by the report of a master, may authorize such trustee or guardian to lease such real estate, on such terms and conditions, at such rental, and for such period, as shall appear just and equitable to said court, with the same force and effect as though said lease were made by the beneficial owner or owners and he or they were sui juris and owned the property in fee. In all cases where such application shall be approved by any orphans' court, the court may direct said trustee or guardian, before making such lease, to file his bond in said court, in such sum as the court shall direct, and with good and sufficient corporate security, or with two good and sufficient individual sureties, approved by said court, conditioned for the faithful application or payment by him of all rents to be received under said lease: *Provided*, That where such trustee or guardian shall be a corporation, duly authorized by law, the court may, in lieu of security as aforesaid, permit such corporation to enter its own bond without surety.

NOTE.—This is a new section. Its form somewhat resembles that of the local Act of March 18, 1869, P. L. 409, 1 *Purd.* 1088, relating only to leases by guardians of mineral lands in Mercer county.

The existing law leaves the power of a trustee to make leases beyond the lifetime of the beneficiary extremely doubtful: *Craig's Estate*, 24 D. R. 851. The proposed section gives express power to make leases for

five years and provides a method of obtaining authority to make longer leases.

See forms 77, 78.

A testator devised his real estate in trust for his wife, for life, and on her death to set aside out of the income of the real estate, or from the proceeds from sale thereof, an undefined sum, sufficient to pay the rent for all time of a pew in a certain church as a memorial to himself. During the lifetime of the cestui que trust the trustees leased the premises for a period of ten years from Jan. 1, 1909; this lease was renewed for nine years at a rental of \$25,000 per annum. Afterwards the trustees presented a petition to the orphans' court, under Section 31 of the Fiduciaries Act of June 7, 1917, P. L. 447, praying for leave to execute lease to another party for a term of ten years from Jan. 1, 1928. The equitable life tenant acquiesced in this petition but the *cestui que trust* in remainder objected, and one of the heirs at law also objected, on the ground that the trust after the present life estate was void; *held*, that, as there was no fund before the court for distribution, no question as to the ultimate distribution of the *corpus* arose until after the termination of the life estate; therefore, no matter how desirable the lease might be from the standpoint of the trustee, or that of the life tenant, since it was opposed by the *cestui que trust* in remainder and by the heir at law and as the time when they would have the legal right to present their claims was uncertain, the court should not prematurely make any decree decisive of their rights or any decree which might in any way imperil them; and as a ten-year lease on top of one which had nine years to run might imperil them, the prayer of the petition was refused. *Archambault's Est.*, 29 Dist. 77.

498. ELECTIONS BY GUARDIANS OR TRUSTEES,— ELECTION TO TAKE REAL ESTATE IN LIEU OF PROCEEDS.

SECTION 32. (a) Whenever, by the provisions of any last will and testament admitted to probate in any county of this commonwealth, any of the real estate of the testator is ordered or directed to be sold and the proceeds therefrom are bequeathed, or are payable or distributable, in whole or in part, to any minor or minors, or cestuis que trust, and it is the desire of all the legatees and beneficiaries interested in said proceeds to elect to take said real estate, in lieu of the several bequests or legacies or interests, it shall be lawful for the orphans' court having jurisdiction of the accounts of the executor of said will, upon the petition of any fiduciary interested, to authorize and empower said fiduciary, on behalf of his ward or cestui que trust, to enter into an election in writing, to take said real estate or part thereof in fee, in lieu of the legacy or legacies, interest or interests, bequeathed or payable or distributable as aforesaid, taking and being entitled to an estate

in said real estate commensurate with the interest said minor or cestui que trust would have had in the fund derived from the sale of said real estate, if the same had been sold in accordance with the provisions of said will. Such election shall be duly acknowledged and recorded in the deed book in the office of the recorder of deeds for the county in which such real estate is situated, and shall be indexed by the recorder in the grantors' index under the name of the decedent, and in the grantees' index under the name of the ward or cestui que trust, the charges for recording to be the same as are provided by law for similar services, and shall then be filed in the office of the clerk of said orphans' court.

NOTE.—This is Section 1 of the Act of July 22, 1913, P. L. 908, 5 Purd. 5888, extended to cover all cases of cestuis que trust, as well as minors, and altered by transposing the language for the sake of clearness, and by making some verbal changes not affecting the substance.

Testator by his will directed a conversion of his land without limit of time within which the conversion should be effected. At the time when the actual conversion of the estate was to occur, certain persons named in the will were to take the interests therein set forth, some of whom were to have absolute estates, and one an estate in trust, and, until conversion all of the *cestuis que trustent* were to receive the income from the corpus absolutely, except one son, to whom a share of the income was given in part, and in part to a trust created for him for the support, maintenance and education of his family. A petition was filed by the trustee for this interest, praying for an order of court authorizing and empowering it to join with those who were sui juris in an election to take the decedent's estate as land by virtue of Section 32 (a) of the Fiduciaries Act of 1917 was granted. Bennett's Est., 67 P. L. J. 363, 20 Lack. 142.

499. ELECTION TO TAKE MONEY INSTEAD OF REAL ESTATE IN WHICH IT IS DIRECTED TO BE INVESTED.

(b) Whenever, by the provisions of any last will and testament admitted to probate in any county of this commonwealth, money is directed to be laid out or invested in real estate, for the use of any minor or minors, or cestuis que trust, and it is the desire of all the beneficiaries interested to elect to take said money instead of the real estate, it shall be lawful for the orphans' court having jurisdiction of the accounts of the executor of said will, upon petition of any guardian or trustee interested, to authorize and empower said guardian or trustee, on behalf of his ward or cestui que trust, to enter into an election in writing, which shall be filed in the office of the clerk of said court, to take said money in lieu

of the real estate, taking and being entitled to an interest in said money commensurate with the estate said minor or cestuis que trust would have had in the real estate if the same had been purchased in accordance with the provisions of said will.

NOTE.—This is a new clause, introduced to cover the converse of the case provided for in clause (a).

500. VALIDATION OF PREVIOUS ELECTIONS.

(c) All elections to take real estate in lieu of legacies or interests, or money instead of real estate, heretofore made by any guardian or trustee pursuant to an order of any orphans' court in this commonwealth, are hereby ratified, confirmed and validated.

NOTE.—This is Section 2 of the Act of July 22, 1913, P. L. 908, 5 Purd. 5888, with some verbal changes and the addition of words to cover clause (b).

501. PROCEDURE WHERE REAL ESTATE IS DEVISED AT AN APPRAISEMENT TO BE MADE OR TO EXECUTOR AT A VALUATION,—JURISDICTION; PETITION.

SECTION 33. (a) Whenever, in any last will and testament, the testator has directed or shall direct all or any part of his real estate to be appraised and sold, or has devised or shall devise such real estate to any person or persons at an appraisement to be made, or has given or shall give to any person or persons the right to take such real estate at an appraisement directed by the testator to be made but has not indicated or shall not indicate by whom such appraisement shall be made, it shall be lawful for any of the parties interested in such real estate or in the sum to be paid therefor to apply, by petition, to the orphans' court of the county in which said real estate is situated, or, in case the real estate is divided by a county line, in the county where the mansion house may be situated, or, if there be no mansion house, in the county where the principal improvements may be, or, if there be no improvements, in either county, setting forth the terms and character of such devise or direction of the testator, and also the names and residences, when known, of all parties interested.

NOTE.—This is Section 1 of the Act of April 17, 1869, P. L. 72, 1 Purd. 1124, altered in phraseology and by providing that the petition may be by persons interested in the sum to be paid for the real estate.

502. APPOINTMENT OF APPRAISERS,—NOTICE.

(b) Upon the presentation of such petition, said court shall appoint two or more disinterested and competent persons, citizens of the county, to make such appraisement, unless the testator has designated the number of persons to make such appraisement, in which case, the court shall appoint the number of persons so designated; and the court shall, by general rule or by special order in the particular case, provide for notice to be given to all parties interested of the time and place of making such appraisement.

NOTE.—This is Section 2 of the Act of April 17, 1869, P. L. 72, 1 Purd. 1124, omitting the provision for the award of an inquest directed to the sheriff, and the provision at the end that the notice shall be given in the same manner as notice is required to be given in partition proceedings, and substituting “competent” for “judicious” in line 2.

503. OATH AND COMPENSATION OF APPRAISERS.

(c) The appraisers so appointed shall be sworn or affirmed, well and truly and without prejudice or partiality, to value and appraise such real estate; and each of such appraisers shall receive, as compensation for his services, such amount as may be allowed by said court, such compensation to be paid out of the estate of the decedent, as part of the costs of administration.

NOTE.—This takes the place of Section 5 of the Act of 1869, 1 Purd. 1124, which provides that the appraisers “shall be duly qualified by the sheriff well and truly,” etc., and of Section 6 which provides that the sheriff and appraisers shall receive the same fees as are allowed in cases of partition in the orphans’ court.

504. RETURN AND CONFIRMATION OF APPRAISEMENT; APPEALS.

(d) The appraisement so made shall be returned to the said orphans’ court and, if confirmed by said court, shall be conclusive on all the parties interested in said real estate, unless an appeal be taken from such decree of confirmation to the proper appellate court within six months after the date thereof.

NOTE.—This is Section 3 of the Act of April 17, 1869, P. L. 72, 1 Purd. 1124, the period for appeal having been changed from three months to six, the usual period. The phraseology has also been modified so as to make it clear that a decree of confirmation is to be entered.

**505. CITATION TO ACCEPT OR REFUSE; DECREE
ADJUDGING REAL ESTATE TO DEVISEE OR
TO OTHER PERSONS; RECORDING AND
REGISTRY OF DECREE.**

(e) Upon the return and confirmation of such appraisement, the court shall issue its citation to the person or persons entitled to take such real estate on compliance with the terms of the will, to appear at a time fixed by said court to accept or refuse the same. If, upon the return of such citation, duly served, such person or persons shall appear and accept such real estate at the appraisement, and shall pay or secure the payment of the amount thereof at such time and upon such terms as shall be fixed by said court, then the court shall adjudge such real estate to such person or persons. If such person or persons shall fail or neglect to appear and accept such real estate at the appraisement or shall refuse to accept it, or, having accepted, shall fail to pay or secure the amount of such appraisement as aforesaid, then the court shall adjudge such real estate to the person or persons entitled thereto under the provisions of the will in the event of such real estate not being taken at the appraisement directed by the testator, or, if the will contains no provision for such event, then the court shall adjudge such real estate to the persons legally entitled thereto. Any such decree may be recorded in the deed book in the office for recording deeds of any county in which such real estate is situated, with the same effect as deeds are recorded, and shall be indexed by the recorder in the grantors' index under the name of the decedent, and in the grantee's index under the name or names of the person or persons accepting such real estate at the appraisement, or of the person or persons entitled thereto in the event of such real estate not being taken at the appraisement, or of the person or persons legally entitled thereto where the will contains no provision for a failure to take at the appraisement, as the case may be, and shall be registered in the survey bureau, or with the proper authorities empowered by law to keep a register of real estate, if any there be, in said county, and the charges for recording and registering shall be the same as are provided by law for similar services.

NOTE.—This is Section 4 of the Act of April 17, 1869, P. L. 72, 1 Purd. 1124, modified so as to provide for a citation and to cover the cases of refusal to accept, of failure to pay after accepting, and of failure of the will to provide for a case of failure to take at the appraisement. The provision for recording and registering is new.

506. WHERE REAL ESTATE IS DEVISED TO EXECUTOR AT A VALUATION.

(f) In all cases of wills, heretofore or hereafter made and duly proved and recorded, wherein the testator has given or shall give the right to one or more persons to take any or all of his real estate at a certain valuation therein named, and has appointed or shall appoint such person or persons as executor or executors, to whom letters testamentary are issued, such person or persons may present his or their petition to the orphans' court of the county in which such real estate is situated, or, in a case where the real estate is divided by a county line, in the county where the mansion house may be situated, or, if there be no mansion house, in the county where the principal improvements may be, or if there be no improvements, in either county, setting forth the terms and character of such devise or direction, that he or they have been appointed executor or executors of the will, that letters testamentary have been issued to him or them, and formally accepting such real estate at such valuation. Upon the presentation of such petition, the court shall have power to adjudge the real estate to such person or persons, and to decree that he or they shall account for the valuation thereof in the settlement of his or their accounts in the orphans' court having jurisdiction of such accounts.

NOTE.—This is Section 1 of the Act of March 5, 1903, P. L. 10, 1 Purd. 1124, with some changes in phraseology for the purpose of condensation. In the next to the last line, "in the orphans' court" has been substituted for "with the register of wills."

Where a testator devises his real estate at a fixed valuation the real estate is converted and the estate distributable as personality.

In such case a decree under the Fiduciaries Act of June 7, 1917, Section 33 (f), P. L. 502, adjudging the real estate to the devisee and executor on his petition does not change the situation but is simply confirmatory of what the will has accomplished and amplifies the evidence of title.

A voluntary payment of the debts of a decedent out of the proceeds of real estate on which they had lost their lien, when approved by all parties, is commendable and a subsequent reaction against such payment should not be favored.

"The devise is somewhat analogous to an executory contract for the sale of real estate entered into by a testator which is executed after his death by a decree of specific performance; and that such property descends as personality will not be disputed. No transformation happened because the devisee chose after the expiration of a year from the death of the testator to have entered a decree as permitted by the Fiduciaries Act of 1917, P. L. 447, Section 33 (f), which authorizes the orphans' court to ad-

judge real estate to persons to whom the right to take the same at a certain valuation has been given in a will, and who are appointed executors of the same will. By virtue of this enactment a devisee for a consideration who is also the executor may petition the court to adjudge the real estate to him which had been devised to him and about which there is no question or uncertainty as to its title, and may also petition the court to have a decree entered against himself ordering himself to account "for the valuation thereof" from which he could not escape had there been no such decree. The act is simply confirmatory and amplifies the evidence of title. It only supplements its publication. The will is the essential demonstration, and by it was the title vested in the devisee at the death of the testator." Per SMITH, P. J., in *Ruch's Est.*, 37 *Lanc.* 69.

507. VALIDATION OF PREVIOUS DECREES.

(*g*) Whenever any orphans' court shall have heretofore made a decree adjudging real estate to certain persons, in any case mentioned and provided for in clauses (*e*) and (*f*) of this section, such decree shall be valid and available to vest in the person or persons to whom such real estate was adjudged, all the right, title and interest of the testator who had died, leaving a will wherein the right to accept such real estate was given.

NOTE.—This is Section 2 of the Act of March 5, 1903, P. L. 10, 1 *Purd.* 1125.

508. DESIGNATION OF CURTILAGE OR BUILDING DEVISED,—JURISDICTION,—PETITION.

SECTION 34. (*a*) Whenever, by any last will and testament, any dwelling-house or other building is devised to any person or persons, without defining the boundaries of the curtilage or lot appurtenant to such building and necessary for the use and enjoyment of the same, it shall be lawful for any of the parties interested to apply by petition to the orphans' court of the county in which such building is situate, for the appointment of commissioners to designate the boundaries of the curtilage or lot appurtenant to such building, and necessary for the convenient use of the same, for the purposes for which it was intended.

NOTE.—This is Section 1 of the Act of April 14, 1868, P. L. 97, 3 *Purd.* 389, revised by omitting unnecessary verbiage, and by omitting after "last will and testament" the following words: "or by reservation or limitation in any deed or deeds of conveyance, or by reservation in any partition between tenants in common or co-parceners," and after "devised," the words "bequeathed, reserved or limited." The word "bequeathed" is inappropriate; and it is difficult to see why the orphans' court should have jurisdiction in cases arising under deeds or amicable partitions, which have nothing to do with decedents' estates.

In the seventh line, the words "by petition" have been substituted for "in writing."

509. APPOINTMENT AND COMPENSATION OF COMMISSIONERS.

(b) It shall be the duty of the said court, on presentation of such petition, to appoint two or more disinterested and competent persons, as they shall think proper, for the purposes aforesaid, which persons shall be sworn or affirmed faithfully to perform their duties as commissioners, and shall be respectively entitled to receive from the estate of the testator, for their services as commissioners, such sum as the said court shall deem proper.

NOTE.—This is Section 2 of the Act of April 14, 1868, P. L. 97, 3 Purd. 3390, changed so as to provide for two or more commissioners instead of three, to require that they be "disinterested and competent" instead of "competent and skilful," to require them to be sworn or affirmed, and to leave the amount of their compensation to the judgment of the court, instead of fixing it at one dollar per day.

510. NOTICE OF PROCEEDINGS OF COMMISSIONERS; REPORT, CONFIRMATION; RECORDING AND REGISTRY OF DECREE; TITLE OF DEVISEE.

(c) It shall be the duty of the commissioners so appointed to give reasonable notice to all parties interested of the time at which they will examine said dwelling-house or other building for the purposes aforesaid, and to make report to the court in pursuance of the order to them directed. In such report, they shall sufficiently designate and describe, by metes and bounds, with their courses and distances, and by draft, if necessary, the limits and extent of ground necessary for the convenient use of such building, for the purposes for which it was intended. If such report shall be approved by the court, a decree of confirmation shall be entered, a certified copy whereof shall be recorded in the deed book in the office for recording deeds of the county in which said building is situate, in like manner as deeds are recorded, and with the same effect, and shall be indexed by the recorder in the grantors' index under the name of the decedent, and in the grantees' index under the name of the devisee of such dwelling-house or other building, and shall be registered in the survey bureau, or with the proper authorities empowered by law to keep a register of real estate, if any there be, in such county, upon pay-

ment of fees for such recording and registration at the rates fixed by law for similar services; and the devisee of such building shall take the same estate in the ground thus set apart as is devised to him in the building.

NOTE.—This is Section 3 of the Act of April 14, 1868, P. L. 97, 3 Purd. 3390, with some changes in phraseology, the omission, at the end, of the words “reserved or limited,” the insertion of the provisions for entry of a decree of confirmation and for recording and registry, and a change in the last clause, which in the Act of 1868, reads that the ground “shall be exclusive property of the occupant of such dwelling house or other building during the full term for which it was devised.”

511. PAYMENT OF COSTS.

(d) All costs of proceedings under this section, including the fees for recording and registration, shall be paid out of the estate of the testator and shall be considered as part of the costs of administration of the estate.

NOTE.—This is substituted for Section 4 of the Act of April 14, 1868, P. L. 97, 3 Purd. 3390, which reads: “The costs of these proceedings shall be equally divided between all parties interested.” That section is unsatisfactory since “all parties interested” is indefinite and “equally” is ambiguous.

512. ABATEMENT AND SURVIVAL OF ACTIONS; SUBSTITUTION OF EXECUTORS AND ADMINISTRATORS; PLEADINGS AS TO ASSETS,—PERSONAL ACTIONS, EXCEPT FOR SLANDER AND LIBEL NOT TO ABATE.

SECTION 35. (a) No personal action hereafter brought, except actions for slander and for libels, and no action for mesne profits or for trespass to real property, shall abate by reason of the death of the plaintiff or the defendant, *or by reason of the death of one or more joint plaintiffs or defendants*,¹ but the executor or administrator of the deceased party may be substituted as plaintiff or as defendant, as the case may be, and the suit prosecuted to final judgment and satisfaction.

NOTE.—This and the following clause are intended to cover the whole subject of abatement and survival of personal actions, and to include the subject matter of Section 28 of the Act of 1834, 1 Purd. 1111; Section 18 of the Act of April 15, 1851, P. L. 674, 1 Purd. 1115; the Act of April 12, 1869, P. L. 27, 1 Purd. 228, relating to actions for mesne profits and for trespass to real or personal property; and Section 1 of the Act of June 24, 1895, P. L. 236, 4 Purd. 4824.

Section 28 of the Act of 1834 provides that executors or administrators may "commence and prosecute all personal actions which the decedent whom they represent might have commenced and prosecuted, except actions for slander, for libels, and for wrongs done to the person; and they shall be liable to be sued in any action, except as aforesaid, which might have been maintained against such decedent if he had lived."

Section 18 of the Act of 1851 provides that no action "to recover damages to the person by negligence or default, shall abate by reason of the death of the plaintiff; but the personal representatives of the deceased may be substituted as plaintiff, and prosecute the suit to final judgment and satisfaction."

Section 1 of the Act of 1895 provides that any right of action "by reason of injury wrongfully done to the person of another shall survive the death of the wrongdoer, and may be enforced against his executor or administrator either by continuing against such personal representative a suit which may have been brought against the wrongdoer himself in his lifetime, or by bringing an original suit against his representative after his death."

The Acts of 1851 and 1895 were intended to amend the Act of 1834 so as to eliminate the words "for wrongs done to the person." There has been some doubt as to whether the Act of 1895 refers only to cases of physical injury or includes such wrongs as malicious prosecution. It seems better to restate the provisions of the law so as to make them entirely clear.

¹ Portion in italics added by amendment of March 30, 1921 (P. L. 55).

513. EXECUTORS AND ADMINISTRATORS MAY SUE AND BE SUED IN PERSONAL ACTIONS, EX- CEPT FOR SLANDER AND LIBEL.

(b) Executors or administrators shall have power *either alone or jointly with other plaintiffs*¹ to commence and prosecute all actions for mesne profits or for trespass to real property, and all personal actions which the decedent whom they represent might have commenced and prosecuted, except actions for slander and for libels; and they shall be liable to be sued *either alone or jointly with other defendants* in any such action, except as aforesaid, which might have been maintained against such decedent if he had lived.

NOTE.—This is Section 28 of the Act of 1834, 1 Purd. 1111 (Section 29 of the Commissioners' Draft), inserting the provision as to actions for mesne profits and for trespass to real property, and omitting, after "libels," the words "and for wrongs done to the person." These words were eliminated by the Acts of 1851 and 1895, set forth in the last preceding note.

Section 28 of the Act of 1834 was new, and was intended to "place the law respecting the right of executors and administrators to commence and

prosecute personal actions upon a certain and equitable basis." The Commissioners of 1830 further remarked that the cases of slander, libel and wrongs done to the person had "always been excepted here and in England, because being derived mainly from personal considerations, it has been supposed to be against the policy of the law to encourage their transmission to or against the representatives of the deceased party. We are disposed to stop with these exceptions, however, and to place all other actions upon the same footing with respect to the right and also form of action, after the death of the party as before."

¹ Portion in italics added by Amendment of March 30, 1921 (P. L. 55).

514. PENDING ACTIONS OF EJECTMENT TO ENFORCE PAYMENT OF PURCHASE MONEY.

(c) In all actions of ejectment which may be pending at the time of the death of any vendor of real estate, when the object is to enforce the payment of purchase money due and owing upon an agreement of sale of such real estate, it shall and may be lawful for the executors and administrators of the deceased vendor to sustain the same in their own names, to the same extent and in like manner as their testator or intestate, if living, could do.

NOTE.—This is Section 5 of the Act of April 9, 1849, P. L. 526, 1 Purd. 1115, modified so as to relate only to actions of ejectment pending at the death of the vendor. If no action has been brought in his lifetime, the remedy in the orphans' court is made exclusive by Section 18 (b) of the present draft (See 460 *supra*.)

515. EXECUTORS OR ADMINISTRATORS MAY SUE OR DISTRAIN FOR ARREARAGES OF RENT-CHARGE; OR OTHER RENT OR RESERVATION, DUE TO DECEDENT.

(d) The executors or administrators of every person who was the proprietor of any rent-charge or other rent or reservation in nature of a rent, in fee or otherwise, as mentioned in Section 11, clause (f), of this act,¹ shall and may have an action for the arrearages of such rent due to the decedent, at the time of his decease, against the person who ought to have paid such rent, or his executors or administrators; or they may distrain therefor upon the lands or tenements which were charged with the payment thereof, and liable to the distress of such decedent, so long as such lands or tenements remain and are in the seisin or possession of the tenant who ought to have paid such rent, or in the possession of any other person claiming the same, from or under the same tenant, by purchase, gift or descent, in like manner as such decedent might have done if he had lived.

NOTE.—This is Section 29 of the Act of 1834, 1 Purd. 1111 (Section 30 of the Commissioners' Draft), which was founded on Section 1, Chapter 37 of the statute 32 Henry VIII.

The words "of debt" have been omitted after "action" in the fifth line.

¹ See 397, *supra*.

**516. EXECUTORS OR ADMINISTRATORS OF LIFE
TENANT MAY SUE FOR PROPORTION OF
RENT DUE UP TO DATE OF DEATH.**

(e) The executors or administrators of any tenant for life, who shall die before or on a day on which any rent was reserved or made payable upon any demise or lease of any real estate, which determined on the death of such tenant for life, may have an action to recover from the lessee or under-tenant of such real estate, if such tenant for life die on the day on which the same was made payable, the whole, or, if before the day, a proportion of such rent for the last year, or quarter of a year, or other current period of payment, according to the time elapsed at the decease of such tenant for life as aforesaid.

NOTE.—This is Section 30 of the Act of 1834, 1 Purd. 1111 (Section 31 of the Commissioners' Draft), which was derived from the statute 11 George II, Chapter 19, Section 15.

The words "on the case" have been omitted after "action" in the fifth line.

**517. EXECUTORS OR ADMINISTRATORS MAY BE
SUBSTITUTED IN PENDING ACTIONS AND
MAY ISSUE EXECUTION ON JUDGMENT IN
FAVOR OF DECEDENT.**

(f) The executors or administrators of any person who, at the time of his decease, was a party, plaintiff, petitioner, defendant or respondent, in any action or legal or equitable proceeding pending in any court of this commonwealth, shall have full power, if the cause of action shall by law survive to or against them, to become party thereto and prosecute or defend such suit or proceeding to final judgment or decree, as fully as such decedent might have done if he had lived; and if such party die after judgment, certificate, or decree in his favor, his executors or administrators may proceed to execution thereupon, as such party might have done if he had lived. *This clause shall apply whether the decedent is a sole or joint plaintiff, petitioner, defendant or respondent.*¹

NOTE.—This is Section 26 of the Act of February 24, 1834, 1 Purd. 1110 (Section 27 of the Commissioners' Draft), derived, as to the first part, from the Act of April 13, 1791, 3 Sm. L. 28, and, as to the last clause, intended to sanction expressly the existing practice of substituting the executor or administrator of the plaintiff in a judgment without sci. fa. See *Romer's Admr. v. Sterling*, 10 S. & R. 119.

The Commissioners remarked that they had placed decrees of the orphans' court on the same footing with judgments. It has been held that the section applies to proceedings in equity as well as at law: *Carroll v. Tufts*, 9 D. R. 144. The words "or equitable" have now been inserted.

Under this section, it was held that all personal actions survived, except actions for slander, libel or wrongs done to the person: *Miller v. Wilson*, 24 Pa. 114. Actions for wrongs to the person are covered by clause (b) of this section of the draft.

The last clause is now changed so as to include cases of judgments for costs, and certificates, in favor of a defendant.

¹ Portion in italics added by amendment of March 30, 1921 (P. L. 55).

518. SCIRE FACIAS TO BRING IN EXECUTORS OR ADMINISTRATORS OF DECEASED PARTY; CONTINUANCE.

(g) The court in which any action or legal or equitable proceeding may be pending at the time of the decease of a party, plaintiff, petitioner, defendant or respondent, shall have power to require, by writ of scire facias, the executors or administrators of such party, within twenty days after the service thereof, to become party to such action or proceeding, or to show cause why they should not be made party thereto, by judgment of the court, and further proceedings be had in such action or proceeding; but in every such case, the executors or administrators, who shall become party as aforesaid, shall be entitled to a reasonable continuance of such action or proceeding, according to the circumstances of the case. *This clause shall apply whether the decedent is a sole or joint plaintiff, petitioner, defendant or respondent.*¹

NOTE.—This is Section 27 of the Act of 1834, 1 Purd. 1111 (Section 28 of the Commissioners' Draft), which was derived from the Act of April 13, 1791, 3 Sm. L. 28, Section 8, now altered by inserting the words "or equitable" in the first line, substituting after the word "pending" in the second line, instead of the words "as aforesaid" the words "at the time of the decease of a party, plaintiff, petitioner, defendant or respondent;" and by providing for "a reasonable continuance" instead of a continuance "during one term." The words "at the next succeeding term" have been omitted after "to show cause."

¹ Portion in italics added by amendment of March 30, 1921 (P. L. 55).

519. SERVICE OF SCIRE FACIAS WHEN EXECUTORS OR ADMINISTRATORS RESIDE WITHOUT THE COUNTY.

(h) Whenever the executor or administrator of a deceased plaintiff, petitioner, defendant, or respondent, in any action or legal or equitable proceeding pending in any court of this commonwealth, resides without the jurisdiction of the said court, the writ of scire facias provided by the preceding clauses of this section may be served on such executor or administrator by the sheriff of the county where he is resident, if in the opinion of the proper court such service may be reasonably practicable; but if otherwise, and also where the said executor or administrator resides in some other state of the United States, such service may be made by publication, in one or more public newspapers, as, in the opinion of the court, will be most likely to give notice to the said executors or administrators; the said manner of service herein provided to have the same force and effect as the manner of service provided by the said clauses.

NOTE.—This is Section 1 of the Act of April 6, 1859, P. L. 384, 1 Purd. 1115. The words “petitioner,” “respondent,” and “legal or equitable” have been inserted in the second and third lines.

520. ACTIONS NOT TO ABATE BY DEATH, DISMISSAL, REMOVAL, RESIGNATION OR RENUNCIATION OF FIDUCIARIES.

(i) No action or other legal or equitable proceeding, commenced by or against fiduciaries, or in which fiduciaries are parties, shall abate or be otherwise defeated, by reason of the death, dismissal, removal, resignation or renunciation of any one or more of them, nor by reason of the annulling or revoking of the letters or powers granted to them, or any of them; but such suit or proceeding may be prosecuted to final judgment or decree, by or against such other person or persons as may have been joined with them in the administration or trust, or by or against such person or persons as may be their successors therein, in all cases, in like manner as if no such change had occurred or act been done; and in all cases of vacancy in the administration or trust as aforesaid, the successors therein shall be made party to such action or proceeding, in the manner provided by clauses (f), (g) and (h) of this section.

NOTE.—This is derived from Section 32 of the Act of 1834, 1 Purd. 1113 (Section 33 of the Commissioners' Draft), which was founded on Section 7 of the Act of March 24, 1818 (7 Sm. L. 132), P. L. 285, 4 Purd. 4929. The latter section includes "executors or administrators, trustees or assignees," and is not to be repealed so far as it relates to trustees not within the jurisdiction of the orphans' court, and to assignees.

The Act of 1818 related only to cases in which suit was brought by fiduciaries. The Act of 1834 extended this to suits against executors or administrators.

Section 13 of the Act of April 9, 1849, P. L. 526, 1 Purd. 1115, includes cases in which executors or testamentary trustees are plaintiffs.

Section 32 of the Act of 1834 is altered, in the present draft, by substituting "fiduciaries" for "executors or administrators," by extending it to cases where fiduciaries are parties although the action was not brought by or against them, by adding "removal" in the fourth line, by adding the words "or trust" in the tenth and fourteenth lines, and by substituting a reference to other clauses of the new act for the reference to Sections 26 and 27 of the Act of 1834. The words "or equitable" have been inserted in the first line.

It seems that Section 13 of the Act of 1849, above referred to, may be repealed, as well as Section 7 of the Act of 1818, so far as it relates to fiduciaries within the scope of the present act.

521. FAILURE TO PLEAD ANY MATTER RELATIVE TO ASSETS, OR TO REPLY THERETO, NOT TO BE DEEMED AN ADMISSION.

(j) The omission of an executor or administrator to plead to any action brought against him in his representative character, that he has fully administered the estate of the decedent, or any other matter relative to the assets, shall not be deemed an admission of assets to satisfy the demand made in such action; also the omission of the plaintiff to reply to any such matter when pleaded, shall not be deemed an admission of the want of assets as aforesaid, nor shall such omission otherwise prejudice either party; and no mispleading, or lack of pleading, by executors or administrators, shall make them liable to pay any debt or damages recovered against them in their representative character, beyond the amount of the assets, which in fact, have come or may come or should have come into their hands.

NOTE.—This is Section 37 of the Act of 1834, 1 Purd. 1114 (Section 38 of the Commissioners' Draft), which was new in the Act of 1834. In the last line the words "or should have come" have been added. It might be considered that this section has been rendered obsolete by the statutory changes in the system of pleading. But the Commissioners have concluded to recommend its retention lest its omission might give rise to some erroneous inference.

522. ABATEMENT OF FAILURE TO TAKE OUT LETTERS IN DECEASED PLAINTIFF'S ESTATE.

(k) In any suit now pending or hereafter to be brought in any court of this state, if the plaintiff be dead or shall die during the pendency thereof, and no letters testamentary or of administration have been or shall be taken out in this state within one year after the suggestion of the death of such plaintiff upon the record, it shall not be the duty of the defendant to raise an administrator for the purpose of prosecuting the same, but the court in which such suit is or shall be pending may, after due service upon the executors named in the will of such plaintiff, if known to defendant, or upon the next of kin of the decedent entitled to administration, of a rule to show cause, enter an order that said suit shall abate, unless, before the return day of such rule, letters testamentary or of administration shall be duly issued.

NOTE.—This is Section 1 of the Act of May 5, 1854, P. L. 570, 1 Purd. 228, 2 P. & L. 2665, changed so as to provide for a rule to show cause. The section now provides that at the end of the year the suit shall abate and the prothonotary shall make an entry accordingly, provided that the court shall direct a notice to be served one month before such entry shall be made.

523. STATUTE OF LIMITATIONS TO RUN AGAINST DEBT FALLING DUE TO ESTATE OF DECEDENT AFTER HIS DEATH ALTHOUGH LETTERS HAVE NOT BEEN GRANTED.

SECTION 36. The statute of limitations shall begin to run against a debt or demand arising or falling due to the estate of a decedent, after his or her death, from the time such debt or demand shall arise or fall due, as aforesaid, notwithstanding that letters testamentary or letters of administration have not been granted on such estate.

NOTE.—This is Section 1 of the Act of April 6, 1905, P. L. 114, 6 Purd. 6527. Section 2 is a general repealer.

In the next to the last line, "granted" has been substituted for "taken out."

524. SUITS AGAINST FIDUCIARIES WHO DO NOT RESIDE IN COUNTY THE COURT OF WHICH HAS JURISDICTION OF THEIR ACCOUNT.

SECTION 37. In all cases where executors, administrators, guardians or trustees shall not reside within the county the

orphans' court of which has jurisdiction of their accounts, proceedings may be had and suits may be brought against them by creditors and others interested in the estates, in the counties where such accounts are to be settled, and process may be served on said fiduciaries, in any other county by the sheriff of such other county, who shall be deputized for that purpose by the sheriff of the county in which the process issues, or process may be served upon any surety on the official bonds of such fiduciaries.

NOTE.—This is Section 1 of the Act of March 27, 1854, P. L. 214, 4 *Purd.* 4929, with the insertion of the words "guardians or" instead of "assignees or other," thus limiting the section to fiduciaries within the scope of the present act. The Act of 1854 is not recommended for repeal so far as it relates to other fiduciaries.

The words "the county the orphans' court of which has jurisdiction" have been substituted for "the jurisdiction of the court having control." The provision as to deputizing the sheriff of another county has been substituted for the following: "and process may be served by proper officers of said counties, or their deputies, on said executors, administrators, assignees or other trustees beyond the bounds of said counties, as if they resided therein, or upon any surety on their official bonds, with like effect as if they had resided within the jurisdiction of the courts having control of their accounts."

A writ of summons can be served by the sheriff upon an executor temporarily within his jurisdiction whose residence is in another county where the letters were granted.

The purpose of the Acts of March 27, 1854, P. L. 214, and of June 7, 1917, P. L. 447, Sec. 37, was to assist creditors and others and not to protect the fiduciary nor to limit the suit to a particular jurisdiction.

Cohn died in Philadelphia on June 24, 1917, having made his last will and testament, duly admitted to probate before the Register of Wills of Philadelphia County, and letters testamentary were granted to the defendant. On August 15, 1918, the plaintiff brought an action in assumpsit in the Court of Common Pleas of Lancaster County against the defendant as executor of the decedent, and while the defendant was visiting there, the Sheriff of Lancaster County served the writ of summons upon him. The sole question raised in the proceeding was whether a writ of summons can thus be served by the Sheriff upon an executor whose residence is in another county while the defendant is in his jurisdiction.

In discharging a rule to set aside the summons the court, per LANDIS, J., said:

"By the Act of June 7, 1917, P. L. 447, called 'The Fiduciaries Act,' the Act of 1854 is expressly repealed, 'so far as it related to fiduciaries subject to the jurisdiction of the orphans' court' (see page 543), and in lieu thereof, the 37th section was inserted, as follows: (quoting it). This, too, is a statute made for the benefit of creditors and others, but not to protect the fiduciary nor to limit the suit to a particular juris-

diction. Particularly is this so, if personal service can be had, for under such circumstances, what good reason would there be for going to another county to accomplish a purpose which could as well be reached at home?" *Harris v. Blatt*, 28 Dist. 11, 35 Lanc. 361, 8 Leh. 80, 66 P. L. J. 648, 32 York 101.

525. SUITS BY FIDUCIARIES AGAINST COFIDUCIARY.

SECTION 38. Where one of two or more fiduciaries shall be personally or individually indebted, obligated or liable to the estate which he represents, it shall be lawful for the other fiduciaries, or either of them, to institute an action at law, bill in equity, or other appropriate legal or equitable proceeding, on behalf of the said estate, against such fiduciary, individually, to recover or enforce the said indebtedness, obligation or liability, in the same manner as though such fiduciary were not connected with the said estate: *Provided*, That this shall not in anywise affect the duty or liability of such fiduciary to account therefor in the office of the register of wills or in the orphans' court in the manner now provided by law, the remedy herein provided being in addition to other remedies, legal or equitable, already existing.

NOTE.—This covers Sections 1 and 2 of the Act of May 11, 1901, P. L. 174, 1 Purd. 1115, substituting "fiduciaries" for "executors, administrators, guardians, assignees, or trustees," inserting "or liable," and "or liability," substituting "other" for "remaining" in line 4, and inserting in the proviso the words from "office" to "in the."

Since the Act of 1901 includes assignees and trustees other than those over whom the orphans' court has jurisdiction, it should not be repealed generally.

"If Edwin A. Yarnall, the executor not indebted, had, under Section 38 of the Fiduciaries Act of June 7, 1917, P. L. 447, proceeded against his co-executor for the amount of the note, it would have been a good defence for Albert T. Yarnall to have averred that his distributive share would be sufficient to pay said indebtedness. Mutual demands extinguish each other, and the indebtedness to the estate by a legatee has always been considered a payment on account of the legacy: *Palmer's Estate*, 2 Del. 180, and cases there cited." THOMPSON, J., in *Young's Est.*, 30 Dist. 182.

526. REVIVAL OF JUDGMENT AGAINST EXECUTOR OR ADMINISTRATOR OF JUDGMENT CREDITOR.

SECTION 39. In all cases where a creditor has appointed or shall appoint his judgment debtor his executor, or where such

judgment debtor has been or shall be appointed administrator of the creditor, and the said judgment is a lien on the real estate of such executor or administrator, and the same is bequeathed specifically to a legatee, or generally in the residuary clause of such testator's will, or where any testator or intestate, having a judgment situated as aforesaid, shall have creditors interested in preserving the lien of such judgment, such legatee or creditor or the next of kin of an intestate, interested in such judgment, may suggest his or their interest in the same upon the record thereof, and issue a writ of scire facias against the defendant, to revive the same, and continue the lien thereof, at any time when such proceedings shall be necessary under the laws of this commonwealth; which judgment, so revived, shall remain for the use of all persons interested therein.

NOTE.—This is Section 2 of the Act of April 3, 1829 (10 Sm. L. 317) P. L. 122, 1 Purd. 1109, changed so as to cover the case of an administrator as well as an executor.

527. COMPROMISE BY FIDUCIARY OF CLAIMS AGAINST ESTATE, OR QUESTIONS AS TO WILL OR DISTRIBUTION.

SECTION 40. Whenever it shall be proposed to compromise or settle any claim, whether in suit or not, by or against a minor or the estate of a decedent, or to compromise or settle any question or dispute concerning the validity or construction of any last will and testament or the distribution of any decedent's estate, the orphans' court having jurisdiction of the accounts of the fiduciary shall be authorized and empowered, on petition by such fiduciary, setting forth all the facts and circumstances of such claim or question and proposed compromise or settlement and duly verified by oath or affirmation, and after due notice to all parties interested, and after due consideration, aided, if necessary, by the report of a master, if satisfied that such compromise or settlement will be for the best interests of such minor or of the estate of such decedent, to enter a decree authorizing the same to be made, which decree shall operate to relieve the fiduciary of responsibility in the premises.

NOTE.—This is a new section.

It would seem that, at present, it is doubtful whether the orphans' court has power to authorize compromises, which must be made by fiduciaries

on their own responsibility: Lowery's Estate, 9 Pa. C. C. 88; Morton's Estate, 201 Pa. 269.

Such jurisdiction however has been frequently exercised to the very great advantage of the parties litigant or concerned in the dispute; and it is proposed in this section to place the jurisdiction of the court beyond question. Otherwise, a fiduciary may feel bound to litigate and thus throw the chances of the litigation on his cestui que trust or ward, or assume the responsibility of the settlement and take the chance of having his conduct questioned in the future.

528. INVESTMENTS BY FIDUCIARIES,—LEGAL INVESTMENTS,—DEBT OF UNITED STATES, ETC.

SECTION 41. (a) 1. When the fiduciary shall have in his hands any moneys, the principal or capital whereof is to remain for a time in his possession or under his control, and the interest, profits or income whereof are to be paid away, or to accumulate, or when the income of real estate shall be more than sufficient for the purpose of the trust, such fiduciary may invest such moneys in the stock or public debt of the United States, or in the public debt of this commonwealth, or in bonds or certificates of debt now created or hereafter to be created and issued according to law by any of the counties, cities, boroughs, townships, or school districts of this commonwealth, or in mortgages or ground rents in this commonwealth: *Provided*, That nothing herein contained shall authorize any fiduciary to make any investment contrary to the directions contained in the will of the decedent in regard to the investment of such moneys.

NOTE.—This and the next two paragraphs are a combination of Section 14 of the Act of March 29, 1832, 1 Purd. 1109, Section 2 of the Act of April 13, 1854, P. L. 369, 1 Purd. 1110, and Section 1 of the Act of May 8, 1876, P. L. 133, 1 Purd. 1110.

The Commissioners believe that the powers of investment granted to fiduciaries under the present law are too greatly restricted and that their enlargement would be welcomed throughout the State. At present trustees are limited to loans of the United States, the State of Pennsylvania, municipal corporations of the State, mortgages and ground rents; and according to the literal wording of the statutes the decree of the orphans' court should be first obtained, although in practice the statutes have been considered as authorizing the investments specified, and the necessity of a preliminary application has been disregarded.

The Commissioners would be willing to recommend a more extensive act were it not for the Constitution, which in Art. III, Section 22, would seem to prohibit the legislature from authorizing an investment in the bonds or stocks of a private corporation. They have, however, drafted

this section so as to include investments in bonds of municipal corporations in other states, requiring, in such instances, a preliminary application to the court for authority to make such investments.

The division into three paragraphs has been made for the purpose of clearness. The investments enumerated in paragraph 1 are made legal investments without application to the court. The requirement of the existing laws that the approval of the court shall be obtained in every case is disregarded in practice; and it seems better to omit this requirement except in cases of investments in real estate in Pennsylvania or in bonds of other states or of municipalities outside of the commonwealth, as enumerated in paragraph 2.

Section 14 of the Act of 1832 was copied from the Act of February 18, 1824, P. L. 25, except that it authorizes the investment of surplus income of real estate as well as principal and interest of personal estate.

The above-mentioned sections of the Acts of 1854 and 1876 apply to all trustees, and should be repealed only so far as they relate to fiduciaries who are within the scope of the present draft.

An investment by a trust company under the supervision of the Department of Banking in the bonds issued by a private corporation, security for which is a mortgage covering the real estate owned by the private corporation, is not a legal investment under the constitution and laws.

Myers, Dep. Atty. Gen., in an opinion to the Banking Commissioner August 16th, 1920, said:—

"There is nothing contrary to Section 22, Art. III of the Constitution in Section 41 (a) of the Act of June 7, 1917, P. L. 447. That act does not authorize fiduciaries to invest in the bonds or stock of any private corporation.

"You are therefore advised that the investment by a trust company under the supervision of your department in the bonds issued by a private corporation, security for which is a mortgage covering the real estate owned by the private corporation, is not a legal investment under the Constitution and laws of the commonwealth." *Hotel Mortgage*, 50 Pa. C. C. 82; s. c. sub nom *In re Trust Funds*, 68, P. L. J. 608.

Where an individual owning real estate in the City of Philadelphia made a first mortgage on the same to a trust company as trustee to secure an issue of 450 \$1,000 bonds, Hon. Robert S. Gawthrop, First Deputy Attorney General in an opinion on November 4, 1921, to the Commissioner of Banking held that such bonds were not comprehended under the word "mortgages" as used in this section of the Act and could not therefore be considered as legal investments for trust funds. In so holding he said:

"Manifestly, the bonds in the present case do not fall within any class of securities described in the above cited section of the act unless it be that they are comprehended within the meaning of the words 'mortgages in Pennsylvania.' If the question were an open one in this State, I should have no hesitation in concluding that the investment in these bonds is not an investment in a mortgage in the Commonwealth. One who buys one of the four hundred and fifty \$1,000 bonds, secured

though it be by a first mortgage given by a trustee, in my opinion, does not invest his money in a mortgage. The owner of the bond has no such independent control of the mortgage as he would have if he owned the mortgage. The question is not one of the safety of the investment, but one of the character thereof as required by the statute. It would have been a simple manner for the Legislature when it enacted the Fiduciaries Act to have authorized trustees to invest in bonds secured by mortgages on real estate situate and owned by individuals in the Commonwealth, but it did not do so and thereby continued the policy of requiring the utmost conservatism in providing legal investments for trust funds."

Legal Investments, 69 P. L. J. 777, 7 Pa. State Dept. Rep. 2060.

(Note:—This is contrary to the expressed opinion of many leaders of the bar.—Editor.)

529. INVESTMENTS IN OTHER REAL ESTATE WITHIN THE COMMONWEALTH, OR IN DEBTS OF OTHER STATES OR COUNTIES OR CITIES THEREOF.

2. When a fiduciary shall have in his hands any moneys, as aforesaid, he may present a petition to the orphans' court having jurisdiction of his accounts, stating the circumstances of the case and the amount or sum of money which he is desirous of investing; whereupon it shall be lawful for the court, upon due proof, aided, if necessary, by the report of a master, to make an order directing the investment of such moneys in real estate in this commonwealth other than ground-rents, or in the bonds or certificates of debt now created or hereafter to be created and issued according to law by any other state of the United States or by any of the counties or cities of such other state, at such prices, or on such rates of interest and terms of payment respectively, as the court shall think fit: *Provided*, That no such investment shall be directed unless it shall be the opinion of the court that it will be for the advantage of the estate and no change be made in the course of succession by such investment as regards the heirs or next of kin of the cestui que trust: *And provided further*, That nothing herein contained shall authorize the court to make an order contrary to the directions contained in any will in regard to the investment of such moneys.

530. FIDUCIARY NOT LIABLE FOR LOSS ON SUCH INVESTMENTS.

3. In case the said moneys shall be invested as set forth in paragraph 1 of this clause, or conformably to the directions of the court under paragraph 2 of this clause, the said fiduciary shall be exempted from all liability for loss on the same, in like manner as if such investments had been made in pursuance of directions in the will creating the trust, it being hereby declared that the investments mentioned in this section are legal investments of moneys by fiduciaries.

531. EXPENSE OF PROCURING GUARANTY OF INVESTMENTS.

(b) Any fiduciary required by law, by the order of any orphans' court, or by the provisions of any last will and testament, under or by authority of which such fiduciary is acting, to invest funds within his control in mortgages or other securities, may include, as a part of the lawful expense of executing his trust, a reasonable sum paid to a company, authorized under the laws of this state so to do, for guaranteeing the payment of the principal and interest of such mortgage or other securities, not exceeding one-half of one per centum *per annum*¹ upon the principal of such mortgage or other securities.

NOTE.—This is Section 1 of the Act of May 28, 1907, P. L. 271, 5 Purd. 5893, changed by substituting the word "fiduciary" for "receiver, assignee, guardian, committee, trustee, executor, or administrator," and omitting the reference to "any assignment, deed * * * or other document."

The Act of 1907 should be repealed only so far as it relates to fiduciaries subject to the jurisdiction of the orphans' court.

Section 2 of the Act of 1907 is a general repealer.

¹ Added by Amendment of May 2, 1919, (P. L. 144).

532. ORGANIZATION OF CORPORATION TO CARRY ON DECEDENT'S BUSINESS,—PROPERTY OF ESTATE MAY BE CONTRIBUTED IN RETURN FOR STOCK WHETHER OR NOT THE WILL AUTHORIZED CARRYING ON THE BUSINESS.

SECTION 42. (a) Fiduciaries may themselves, or jointly with others, organize a corporation to carry on the business of the decedent, whether he die testate or intestate, whether the business

was owned solely by him or in partnership with others, if such business be one for which a charter could have been obtained in the lifetime of the decedent, and may contribute all or part of the property of the estate which was invested in the business at the time of the death of the decedent, as capital to such corporation and accept stock in the corporation in lieu thereof.

NOTE.—This and the two following clauses are based upon Section 1 of the Act of April 22, 1889, P. L. 42, 4 Purd. 4928, extended to cases of guardians and administrators and to cases where the will does not authorize or direct the continuance of the business. Cases where the testator was a partner with others are also included, and the phraseology has been modified.

The Commissioners have considered that the provisions of the Act of 1889 might well be extended in this way. Very often the testator is engaged in a profitable business and its incorporation will obviously be of great benefit to the cestuis que trust interested in the estate, or when the decedent dies intestate the interests of his minor children can best be conserved by an incorporation of the business. In the present state of the law this cannot be done by trustees or guardians without possible risk to them personally; and in cases of a partnership dissolved by death, where the partnership articles do not sufficiently protect the estate of the deceased partner, a forced liquidation may be disastrous.

As the incorporation must be effected under the supervision of the court, it is conceived that the interests of all parties concerned will be properly safeguarded.

533. APPROVAL OF ORPHANS' COURT NECESSARY; PROCEDURE.

(b) No such corporation shall be organized without the approval of the orphans' court having jurisdiction of the accounts of such fiduciaries first had and obtained, upon petition filed setting forth all the facts and circumstances and the proposed terms and conditions of the organization. Such notice as shall be prescribed by said court shall be given to all persons having any beneficial interest, vested or contingent, in the estate of the decedent, who are in being at the time of the filing of such petition; and the said court shall approve such organization only after inquiring into the circumstances and the proposed terms and conditions of such organization, aided, if necessary, by the report of a master, and only with the written consent of all persons interested who shall be sui juris, and of the guardians or committees of such as shall be under age or non compos mentis

NOTE.—In this clause, the phraseology has been altered and the provisions of the Act of 1889 for the appointment of special guardians or committees in such proceedings and for the consent of the husbands of persons interested have been omitted.

534. HOW STOCK SHALL BE HELD; VOTING STOCK.

(c) The stock of any such corporation issued to such fiduciaries shall be held by them for the same uses, trusts and persons as the estate and property were held before the organization of such corporation; they shall have the same right and power to vote such stock, subject to the same control by the court, as prescribed by Section 43 of this act regarding shares of stock belonging to the decedent; and they shall have the right to sell such stock under the direction of the court.

NOTE.—In this clause, “the stock of any such corporation issued to such executors,” etc., has been substituted for “the whole of the proceeds of the trust estate, whether contributed or sold, and whether paid for by shares or money,” and the provisions as to voting and sales have been added.

535. VOTING OF STOCK IN CORPORATIONS BY FIDUCIARIES.

SECTION 43. Fiduciaries, whether appointed by last will and testament or by decree of the orphans’ court, shall have the same right and power, either in person or by proxy, at all corporate meetings, to vote any and all shares of stock, held by them in a fiduciary capacity, in any corporation organized under the laws of this commonwealth, as the deceased, or legal owner thereof had in his lifetime. And where such stock is registered on the books of such corporation in the name of, or has passed by operation of law or by virtue of any last will and testament to more than two fiduciaries, and dispute shall arise among them, the said shares of stock shall be voted by a majority of such fiduciaries, and in such manner and for such purposes as such majority shall authorize, direct or desire the same to be voted. If the number of fiduciaries shall be even and they shall be equally divided upon the question of voting such stock, it shall be lawful for the orphans’ court having jurisdiction of their accounts, upon petition filed by any of such fiduciaries or by any party in interest, to direct the voting of such stock in the manner which, in the opinion of said court, will be for the best interests of the parties beneficially interested in the stock.

NOTE.—This is Section 1 of the Act of March 16, 1905, P. L. 42, 5 Purd. 5890, altered by substituting "fiduciaries" for "executors, administrators, guardians and trustees," and "the orphans' court" for "the proper court," and by omitting, after "lifetime," in line 8, the words, "or during his legal ownership thereof," which seem not to apply to trusts within the scope of the present draft.

The Act of 1905 is apparently intended to include trustees appointed by the common pleas, though it makes no provision as to trustees appointed by deed. The act should be repealed only so far as relates to fiduciaries who are within the scope of the present act.

The expression "any corporation in this commonwealth or organized under the laws of the same" has been changed to "organized under the laws of this commonwealth," and "certified, or stands on the books" has been changed to "registered on the books." The last sentence is new.

536. LIABILITY OF EXECUTORS AND ADMINISTRATORS FOR INTEREST,—WHEN LIABLE.

SECTION 44. (a) No executor or administrator shall be liable to pay interest but for the surplusage of the estate remaining in his hands or power when his accounts are or ought to be filed: *Provided*, That nothing herein contained shall be construed to exempt an executor or administrator from liability to pay interest, where he may have made use of the funds of the estate for his own purposes.

NOTE.—This is Section 17 of the Act of March 29, 1832, 1 Purd. 1125 (Section 18 of the Commissioners' Draft). It was derived, as to the first sentence, from Section 6 of the Act of March 27, 1713, 1 Sm. L. 81, which, however, included the words "guardian or trustee." The proviso was new in the Act of 1832.

The Commissioners of 1830 reported that this section ought not to include guardians or trustees, "inasmuch as they are liable for interest upon entirely different principles, and not merely after the period when their accounts 'are or ought to be settled.'"

The changes now made are: to substitute "filed" for "settled and adjusted," to omit "in the register's office," after "filed;" and to omit, at the end, "previously to the time when his accounts are or ought to be filed as aforesaid."

537. RATE OF INTEREST.

(b) The amount of interest to be paid in all cases by fiduciaries shall be determined by the orphans' court, under all the circumstances of the case, but shall not, in any instance, exceed the legal rate of interest for the time being.

NOTE.—This is Section 18 of the Act of March 29, 1832, 1 Purd. 1126 (Section 19 of the Commissioners' Draft), which was new in that act.

The only change is to substitute "fiduciaries" for "executors, administrators and guardians."

538. SAME PERSON SHALL NOT RECEIVE COMMISSIONS AS EXECUTOR AND TRUSTEE.

SECTION 45. In all cases where the same person shall, under a will, fulfill the duties of executor and trustee, it shall not be lawful for such person to receive or charge more than one commission upon any sum of money coming into or passing through his hands, or held by him for the benefit of other parties; and such single commission shall be deemed a full compensation for his services in the double capacity of executor and trustee: *Provided*, That any such trustee shall be allowed to retain a reasonable commission on the income he may receive from any estate held by him in trust as aforesaid.

NOTE.—This is Section 1 of the Act of March 17, 1864, P. L. 53, 1 *Purd.* 1127.

The words "income" and "estate" are substituted for "interest" and "sum" in the last two lines.

Where the will directs the executors to pay over to the trustees all dividends, interest and returns of principal as received, so that the testator himself must have contemplated that, before making disbursements of income, the trustees would deduct their lawful commissions thereon, and where an allowance of trustees' commissions on income at 5 per cent, is not excessive for the services rendered, it is immaterial to the cestuis que trust whether one trustee retained all the commissions credited against income or divided them with his co-trustee, who, as executor received a part of the commissions allowed the executors on the same income, and the court will allow the trustees credit for the full amount of such commissions.

"It may well be doubted if the Act of March 17, 1864, P. L. 53, or the succeeding act, section 45 of the Fiduciaries Act of June 7, 1917, P. L. 447, 511, applies to income, although it goes without saying that under ordinary circumstances, where an accountant is both executor and trustee, he would be allowed but one commission on income collected. The question would not have arisen if the executors, had, as is customary, distributed the income direct to the life-tenants; but they were prevented from doing this by the language of the will, which, by the seventh paragraph thereof, directs the executors to pay over to the trustees all dividends, interest and returns of principal as received, so that the testator himself must have contemplated that, before making disbursements of income, the trustees would deduct their lawful commissions thereon. Assuming, therefore, as we must from the record before us, that an allowance of commissions on income at 5 per cent. is not an excessive allowance for the services rendered, it is, as pointed out by the auditing judge, immaterial to the

cestuis que trust whether the Fidelity Trust Company retained all the commissions credited against income or divided them with its co-trustee. GUMMEY, J., in *Merchant's Est.*, 30 Dist. 92.

539. ACCOUNTS OF EXECUTORS, ADMINISTRATORS AND TRUSTEES,—ACCOUNTS OF EXECUTORS AND ADMINISTRATORS TO BE FILED IN SIX MONTHS; MAY BE CITED TO ACCOUNT AT END OF SIX MONTHS.

SECTION 46. (a) It shall be the duty of every executor and administrator to file in the register's office a just account of the administration of the estate at the expiration of six months from the time of administration granted or when thereunto required by the orphans' court, and any executor or administrator may be cited to file his account, after the expiration of six months from the date of issuance of letters testamentary or of administration, on petition of any person having an interest, present or future, vested or contingent, in the estate of the decedent, or on petition of any creditor of the decedent.

NOTE.—The first part of this clause is derived from Section 15 of the Act of March 15, 1832, P. L. 139, 1 Purd. 1089, but the period is reduced from one year to six months, "at the expiration of" is substituted for "within,"¹ and "required by the orphans' court" for "legally required." The remainder of the clause is new, is declaratory of the existing law, and embodies the provisions of the first part of Section 1 of the Act of April 17, 1869, P. L. 70, 1 Purd. 1138, which enables the owner of any contingent interest in the personal property of any decedent to require an executor or administrator to file his accounts.

The remainder of that section, enabling the owner of a contingent interest to require the legatee of any previous interest in the same property to give security, is covered by Section 23 of the present draft. (See 469 *supra*.)

Formerly the term of one year was perhaps a convenient period for filing an account, but under modern conditions of rapid communication and transportation, it is no longer necessary or advisable. The majority of estates can now be settled by the end of six months, and it is often a great hardship to legatees and creditors to compel them to wait for a full year before their just claims can be satisfied. And where the estate is so complicated that a final account cannot be rendered at the end of six months, a partial account may be filed, debts paid or at least ascertained with some degree of certainty, and the will construed by the court at the audit of the account.

The Commissioners are of opinion that this shortening of the term will be of great advantage.

¹This should apparently be "in."

See form 81.

The court will not open a duly filed and confirmed administration account on the petition of a next of kin and a creditor, who failed to give written notice of their claims to the accountant as required by Section 46, (c), of the Fiduciaries Act, 1917, P. L. 447, and who had notice of the filing of the account from one other than the accountant, on the ground that the administrator had not given them actual notice of the filing of the account.

Interested parties, who request it, should have ample notice of the time and place of the application for the appointment of an auditor to distribute the balance on an administration account. *Morthland's Est.*, 32 York 137.

The provision of the Fiduciaries' Act requiring an accounting by executors, etc. at the expiration of six months, does not apply where decedent died prior to the passage of the Act. *Amodei's Est.*, 27 Dist. 373.

Except in the case of an administration pendente lite or de bonis non, an account of an executor or administrator filed before the expiration of six months from the grant of letters is premature, and distribution, if made, is at the risk of the accountant, although six months have elapsed between the death of the decedent and the date of audit.

"The section of the Fiduciaries Act of 1917 above quoted now takes the place of section 15 of the Act of March 15, 1832, P. L. 135, and reduces the time for filing an account from one year to six months; but the reasoning of the judge who filed the opinion in *Clemen's Estate* (21 Dist. 175), applies with greater force to the present act, in which the words "at the expiration of" are substituted for the word "within." In order, however, that any question as to the proper time for the filing of an account might be set at rest, we incorporated in Rule II of this (Phila.) court the following section:

"1. Accounts of executors and administrators will not be audited unless filed after the expiration of six months from the date of the grant of letters testamentary or of administration, except in the case of administrations pendente lite and administrations de bonis non, where more than six months have elapsed since the granting of the original letters."

The reasons for excepting administrations pendente lite and those de bonis non are set forth in *Clemens's Estate*, 21 Dist. R. 175, and if authority is needed for our right to make this matter the subject of a rule of court (which counsel seemed to doubt) it is to be found in section 10 of the Orphans' Court Act of 1917, and in *McGreevy v. Kulp*, 126 Pa. 97; *Gannon v. Fritz*, 79 Pa. 303, and numerous other cases." *GUMMEY, J.*, in *Hayden's Est.*, 28 Dist. 39.

"Under the Act of March 15th, 1832, P. L. 139, Pur. Dig., page 1089, an executor or administrator was required to file "a just account and settlement of," the "goods, chattels and credits" of the deceased, "in one year, or when thereunto legally required." In the Commissioners' note to Sec. 46 (a) of the Fiduciaries Act of 1917, it is inadvertently stated that in this section of the Act of 1832, the word "within" is used, but it is intended doubtless to refer to Section 24 of the Act, Purd. Dig., page 1078, where the form of the condition of the fiduciary's bond is prescribed, which includes an obligation to account "within one year" from its date, or when thereunto legally required. Under Sec. 38 of the Act of 1832, Purd. Dig.

page 1130, no distribution could be enforced "until one year be fully expired from the granting of the administration of the estate." In construing this statute, in *Raestaetter's Estate*, 15 Sup. Ct., 549, that court held that the words "in one year," meant "at the expiration of one year." It was the practice in this court prior to the passage of the Fiduciaries Act of 1917, to audit accounts filed within a year after letters were granted at any time fixed for the audit of cases after the expiration of a year from the grant of letters; in other words, this court did not rule that an account could not be filed within the year, but that, if so filed, it could be audited after the expiration of a year from the grant of letters.

The law respecting the matters involved in this adjudication has been altered by the Fiduciaries Act of 1917 as shown by the following provisions in the several sections of the Act which are cited. There must be a bond, conditioned, *inter alia*, for an accounting "at the expiration of six months from its date" 8 (a); a just account of the administration of the estate filed in the Register's office 46 (d); "at the expiration of six months from the time of administration granted, or when thereunto legally required" 46 (a); and there is a prohibition against compulsory distribution "until six months be fully expired from the granting of the letters testamentary or of administration in the estate" 49 (a). An account filed with the Register of Wills at the expiration of six months from the grant of letters, under 46 (d) will be transmitted by him to the orphans' court at its next stated meeting after the account is filed, not less than thirty days distant at the time of filing the account, and, after advertisement for four weeks, it will be presented to said court for confirmation. In counties where separate orphans' courts are established, "all accounts filed in the office of the Register of Wills, or in the orphans' court, by fiduciaries, shall be examined and audited by the court" 47 (b); and, if a creditor, who has notified the fiduciary of his claim and has received notice of the filing of the account, does not present his claim, "at an audit held not less than six months after the grant of letters testamentary or of administration," duly advertised as required in Sec. 10, he will not be entitled to receive "a share of the assets distributed in pursuance of such audit, whether the estate be solvent or insolvent" 49 (d). Under 47 (a) the judges of the orphans' court have power and authority "to establish in their discretion such rules and regulations as they may deem proper, for the publication of advertisements of notices of the auditing of accounts of fiduciaries * * * as well as by special order in particular cases, as by general rules."

Now, when it is required of a fiduciary, deriving his powers and authority from letters granted by the Register of Wills, to file an account at the expiration of six months, and of the Register of Wills that he advertise that account for four weeks and transmit, after the advertisement thereof, to the orphans' court for confirmation at its next stated meeting after it is filed, being not less than thirty days distant from the time of filing, it cannot be argued from the sections of the Fiduciaries Act relied upon in coming to the conclusion in this case, that the fiduciary can voluntarily file his account within six months from the grant of letters, or, that there can be an audit and confirmation immediately after the expiration of

six months from the grant of letters. Creditors and all parties interested in the distribution are entitled to the Register's published notice of the filing of the account at the expiration of the statutory period required for administration, and when the protection afforded by these sections of the Act herein referred to is invoked, there must be a strict compliance therewith before there can be an exercise of the judicial functions of audit and final confirmation necessary to make a decree binding upon them."

Cooper's Est. 29 Dist. 230, 67 P. L. J. 17; 36 Lanc. 266, 20 Lack. 46, 32 York, 145.

One who has a *prima facie* claim against the estate of a decedent is entitled to require an account by personal representatives.

The orphans' court will not deny a creditor of a decedent the right to proceed to have his claim adjudicated in that court and relegate him to his common law action.

"The question presented is whether the petitioner has sufficiently shown himself to be a creditor so as to be entitled to compel the filing of an account. The rights of creditors seem to be the same under the Fiduciaries Act as they were under the prior existing law. * * *

In any event the right of a creditor to proceed in the orphans' court seems to be concurrent with his right to proceed by a common law action. Philip's Administrator v. Railroad Company, 107 Pa. 465. We know of no case which holds that the court may relegate a creditor to his common law action and deny him the right to proceed to have his claim adjudicated at the orphans' court.

We are, therefore, of opinion that the petitioner is entitled to require the filing of an account." Laverty's Est., 50 Pa. C. C. 259, 24 Dauphin 107, 30 Dist. 507.

540. ORPHANS' COURT MAY APPOINT EXAMINERS TO MAKE EXAMINATIONS OF ASSETS IN HANDS OF FIDUCIARIES.

(b) The several orphans' courts of this commonwealth shall have power, by general rule or special order, to appoint one or more examiners to make periodical or special examinations of the assets of estates in the hands of fiduciaries, and power to require all persons in whose custody or control such assets may be held, to present them for such examination. The examiners so appointed shall be compensated by reasonable fees to be fixed by the court and to be paid out of the respective estates.

NOTE.—This is a new section.

At present the orphans' court has not explicitly been given this general power, and the deplorable cases of embezzlement, especially by trustees, that occur from time to time have induced the Commissioners to recommend this provision as at least a partial preventive.

541. CLAIMANTS WHO HAVE NOTIFIED EXECUTORS, ADMINISTRATORS OR TRUSTEES TO BE ENTITLED TO RECEIVE ACTUAL NOTICE OF FILING OF ACCOUNTS.

(c) The several orphans' courts of this commonwealth shall by general rule provide that any person who, claiming to be interested in the estate of any decedent as creditor, legatee, next of kin or otherwise, has given written notice of his claim to the executor, administrator or trustee, or his attorney, shall be entitled to receive actual notice from said executor, administrator or trustee, or his attorney, of the filing of his account; or such rule of court may provide for the filing of such claims with, and the giving of notice by, the register of wills or the clerk of the orphans' court.

NOTE.—This is a new clause.

The attention of the Commissioners has been called by numerous suggestions from members of the Bar to the advisability of a provision of this nature. It is certainly fair and conducive to an orderly procedure in the settlement of decedents' estates that a creditor or other person interested, who has given notice of his claim, should be apprised of the filing of the account. The Commissioners are of opinion that it is better to provide for the procedure by rules of court than by a peremptory statute, as the comparative elasticity of rules of court will enable the court to arrive at a just result in each particular case.

The court will not open a duly filed and confirmed administration account on the petition of a next of kin and a creditor, who failed to give written notice of their claims to the accountant as required by Section 46, (c), of the Fiduciaries Act, 1917, P. L. 447, and who had notice of the filing of the account from one other than the accountant, on the ground that the administrator had not given them actual notice of the filing of the account.

Interested parties who request it, should have ample notice of the time and place of the application for the appointment of an auditor to distribute the balance on an administration account. *Morthland's Est.*, 32 York 137.

542. REGISTER'S DUTIES AS TO TRANSMISSION AND ADVERTISING OF ACCOUNTS; EXPENSES.

(d) Every register, with whom an account has been or shall be filed, shall transmit the same to the orphans' court of the respective county, at its next stated meeting, being not less than thirty days distant from the time of such filing, of all which he

shall give notice to all persons concerned, in the following manner, viz: by an advertisement enumerating all the accounts to be presented at any one time to the said court, in at least two secular newspapers, if there be two, published in the respective county, or if there be but one newspaper published in such county, then in that one, or if there be none, then in one printed nearest to the said county, at least once a week during the four weeks immediately preceding the meeting of the court at which such account shall be presented, setting forth, in substance, that the accountants, naming them and the character in which they respectively act, have filed their accounts in the office of the said register, and that the same will be presented to the orphans' court for confirmation, at a certain time and place, mentioning the same; and also by setting up conspicuously in his office, and in at least six other of the most public places in the county, at least four weeks before the time appointed for the presentation of such accounts as aforesaid, fairly written or printed copies of such advertisement. The actual expenses of such advertisement, according to the usual rates of advertising in such newspapers, and the setting up of such notices, shall be divided among all the accounts presented at the same court, and the proper portion only shall be charged in any of the said accounts, and allowed to the register as the cost of such advertisement and notices.

NOTE.—This is Section 30 of the Act of March 15, 1832, 1 Purd. 1125 (Section 37 of the Commissioners' Draft, except that the provision as to counties where no newspaper is published was added in the Act of 1832). It was derived with slight alterations from the Acts of April 4, 1797, Section 9, 3 Sm. L. 296, and April, 1, 1823, Section 1, P. L. 286. The insertion of the word "secular" in line 8 covers the provision of the Act of April 15, 1867, P. L. 86, 1 Purd. 1125, note (o).

Section 29 of the Act of March 15, 1832, P. L. 143, 1 Purd. 1125, providing that the register, "before he shall allow the accounts of any executor or administrator, shall carefully examine the same, and require the production of the necessary vouchers, or other satisfactory evidence of the several items contained in it," is recommended for repeal, the practice prescribed having fallen into disuse.

Notice to creditors by advertisement of account is futile if the account is prematurely filed. Hayden's Est., 28 Dist. 39.

543. ORPHANS' COURT MAY REQUIRE ADDITIONAL NOTICE WHERE PARTIES IN INTEREST RESIDE OUT OF THE STATE, OR WHERE OTHER CIRCUMSTANCES RENDER FURTHER NOTICE EXPEDIENT.

(e) When any of the heirs, legatees, distributees or creditors of a decedent reside out of this state, or out of the United States, or from other circumstances it may be expedient that additional or further notice should be given of the settlement of the account of a fiduciary, or of the disposition of the assets or surplusage of the estate, it shall be in the discretion of the orphans' court to require such further or additional notice to be given by such accountant, as they may think proper, to appear in court, or before the auditor or auditors by them appointed as the case may be, at such times as shall be fixed for the examination of such account, or for the distribution of the assets or the surplusage of the estate.

NOTE.—This is Section 20 of the Act of March 29, 1832, 1 Purd. 1127 (Section 21 of the Commissioners' Draft), which was new in the Act of 1832. The only change now made is to substitute "fiduciary" for "executor, administrator, guardian or trustee," and to insert "auditor or" before "auditors."

544. ACCOUNTS NOT TO BE CONFIRMED UNLESS IT APPEARS THAT NOTICE HAS BEEN GIVEN.

(f) No account of an executor, administrator or guardian shall be confirmed and allowed by the orphans' court, unless it shall appear, at the presentation of such account, that notice of such presentation has been given, conformably to the directions of this act.

NOTE.—This is Section 15 of the Act of March 29, 1832, P. L. 193, 1 Purd. 1125 (Section 16 of the Commissioners' Draft), which was new in the Act of 1832, although apparently in conformity with the then existing practice.

The only changes now made are to omit the reference at the end of the section to "An act relating to registers and registers' courts," (the provisions of that act being now incorporated in the present act), and to omit, after "orphans' court" in the third line, the words "except in the cases herein especially provided for."

545. WHERE TRUSTEES' ACCOUNTS SHALL BE FILED; EXCLUSIVE JURISDICTION OF ORPHANS' COURT.

(g) All trustees who are subject to the jurisdiction of the orphans' court shall file their accounts in the court appointing them or, in the case of testamentary trustees, in the orphans' court of the county where the will is or shall be probated. The orphans' court shall have exclusive jurisdiction of the accounts of all trustees appointed by such court, and of all testamentary trustees, whether such trusts are vested in executors or administrators *virtute officii* or in trustees named in the will, saving, however, the jurisdiction of the courts of common pleas under existing laws in cases of trustees who have filed their accounts in such courts before the approval of this act, and cases of substituted testamentary trustees appointed by any court of common pleas before the approval of this act.

NOTE.—The first part of this clause is derived from Section 1 of the Act of May 3, 1909, P. L. 391, 6 Purd. 6565, altered so as to apply only to trustees who are within the scope of the present act, and to provide in what courts the accounts shall be filed. The remainder of the clause is new and is intended to take away the concurrent jurisdiction of courts of common pleas in cases of testamentary trusts in persons named in the will. This jurisdiction as to trusts *nominatim* was conferred by Section 15 of the Act of June 14, 1836, P. L. 632, 4 Purd. 4880, upon the court of common pleas of the county where the trustee resided at the commencement of the trust, and was held to be concurrent in *Brown's Appeal*, 12 Pa. 333, although as to trusts *virtute officii* the jurisdiction of the orphans' court is exclusive: *Innes's Estate*, 4 Whart. 179; *Baird's Case*, 1 W. & S. 288. In *Anderson v. Henzey*, 7 W. N. C. 39, it was remarked that the safest course was to invoke the aid of the orphans' court in all cases of testamentary trusts. The jurisdiction of the common pleas has been rarely exercised in recent years, and the late decision of the supreme court in *Simpson's Estate*, 253 Pa. 217, reversing 23 Dist. Rep. 750, brought the matter to the attention of the Commissioners, who are of opinion that there is now no good reason why the jurisdiction of the orphans' court should not be made exclusive as to both classes of testamentary trusts.

"This part of the act was passed apparently to do away with the fine distinction that had been made by the courts in holding that if the trust was given to the executors as such, then the orphans' court has jurisdiction, but if given to individuals *nominatim* although they were later in the will named as executors, the jurisdiction was in the court of common pleas sitting in equity." Opinion of WOODWARD, J., in dismissing a bill in equity for a decree involving the construction of a testamentary trust and distribution thereunder. *Engle v. Engle*, 21 Luz. 277.

The Fiduciaries Act of June 7, 1917, 46 (g), P. L. 447, abolished the concurrent jurisdiction formerly exercised by the court of common pleas and the orphans' court over the accounts of testamentary trustees appointed nominatim by the will, and vested such jurisdiction exclusively in the orphans' court of the county where the will is probated. Girard's Est., 48 Pa. C. C. 608, 29 Dist. 62.

Under section 46 (g) of the Fiduciaries Act of June 7, 1917, P. L. 447, which provides that all trustees subject to the jurisdiction of the orphans' court shall file their accounts in that court, and (h) that they may file their accounts triennially from their appointment, any party in interest may compel the filing of a triennial account.

The jurisdiction of the court to compel the filing of an account by a trustee after the expiration of fourteen years is not ousted by the rendering of semi-annual statements by the trustee to the cestui que trust, nor by the advice of counsel for the trustee that, in view of the semi-annual accounts and the acceptance by the parties of checks for the amounts thereby shown to be due them, and tender of vouchers for all payments, no account should be required to be filed. Noble's Est., 27 Dist. 336, 35 Lanc. 369, 66 P. L. J. 414, 19 Lack. 341.

546. TRIENNIAL ACCOUNTS OF TRUSTEES.

(h) All trustees who are subject to the jurisdiction of the orphans' court may hereafter, triennially, from the date of their appointment, file their accounts in said court, which accounts shall be duly audited, and confirmed absolutely to that date. This clause shall apply to and permit all such trustees, who have been acting in such capacity for more than three years before the passage of this act, to file their accounts, which shall be audited and confirmed absolutely to the date of such filing, and, in like manner, to file their accounts triennially thereafter.

NOTE.—This is also derived from Section 1 of the Act of May 3, 1909, P. L. 391, 6 Purd. 6565. The law prior to the Act of 1909 did not expressly permit trustees to file triennial accounts, and it is considered best to authorize in terms the practice that has been followed in many parts of the State. The Act of 1909 applies to "all trustees of estates and all committees of the estates of lunatics and habitual drunkards," and it has been thought that it was intended to include only trustees of the estates of lunatics and habitual drunkards.

Under section 46 (g) of the Fiduciaries Act of June 7, 1917, P. L. 447, which provides that all trustees subject to the jurisdiction of the orphans' court shall file their accounts in that court, and (h) that they may file their accounts triennially from their appointment, any party in interest may compel the filing of a triennial account.

The jurisdiction of the court to compel the filing of an account by a trustee after the expiration of fourteen years is not ousted by the rendering

of semi-annual statements by the trustee to the cestui que trust, nor by the advice of counsel for the trustee that, in view of the semi-annual accounts and the acceptance by the parties of checks for the amounts thereby shown to be due them, and tender of vouchers for all payments, no account should be required to be filed. *Noble's Est.*, 27 Dist. 336, 35 *Lanc.* 369, 66 P. L. J. 414, 19 *Lack.* 341.

547. NOTICE OF FILING TRUSTEES' ACCOUNTS.

(i) Due notice of the filing of any account of a trustee in the orphans' court of any county shall be given by advertisement as prescribed by rule of said court, and in such other manner as the said court may, in each particular case, direct, to all persons interested in the estate; and absolute confirmation of such account shall not be entered unless all such persons interested are legally competent and qualified, either personally or by their guardians or committees, to appear in court and object to said account if they so desire.

NOTE.—This is founded on the second proviso to Section 1 of the Act of May 3, 1909, P. L. 391, 6 *Purd.* 6565, broadened so as to apply to all accounts of trustees and not merely triennial accounts, and modified so as to provide for notice by advertisement and such other notice, if any, as the court may direct, instead of "due and actual notice."

548. AUDITS,—RULES OF COURT AS TO PUBLICATION OF NOTICE OF AUDITS.

SECTION 47. (a) The judges of the orphans' courts of this commonwealth, respectively, shall have power, and are hereby authorized, to establish, in their discretion, such rules and regulations as they may deem proper for the publication of advertisements of notices of the auditing of accounts of fiduciaries and shall have supervision of and regulate the cost of such publication in all such cases, as well by special order in particular cases, as by general rules.

NOTE.—This is Section 1 of the Act of March 18, 1875, P. L. 29, 3 *Purd.* 3370. In the first line, the word "separate" has been omitted. The section also provides for publication of notices of sales of real estate under proceedings in said court, notices to parties in proceedings in partition, and all other cases within their jurisdiction, and for the establishment of a bill of costs for services of clerks. Those parts of the section are covered in other places.

See *Cooper's Est.*, 29 Dist. 230, 67 P. L. J. 17, 20 *Lack.* 46, 36 *Lanc.* 266, 32 *York* 144.

549. AUDITS BY COURT IN COUNTIES HAVING SEPARATE ORPHANS' COURT.

(b) In any county in which a separate orphans' court shall be established, all accounts filed in the office of the register of wills, or in the orphans' court by fiduciaries, shall be examined and audited by the court, without expense to the parties, except where all parties in interest in a pending proceeding shall nominate an auditor, whom the court may, in its discretion, appoint.

NOTE.—This is the proviso to Section 6 of the Act of May 19, 1874, P. L. 207, 3 Purd. 3369, which was passed in pursuance of Article V, Section 22 of the Constitution of 1874. The words "by fiduciaries" have been added in line 3, and "examined and" in line 4.

550. AUDITS BY COURT OR AUDITORS IN COUNTIES NOT HAVING SEPARATE ORPHANS' COURT.

(c) In any county in which a separate orphans' court shall not be established, all accounts filed in the office of the register of wills or in the orphans' court by fiduciaries shall be examined by the court, and, if not excepted to, shall, after due consideration, be confirmed. If any person interested in the estate shall except to the account, or any of the parties shall desire to refer the account to an auditor, the court shall decide whether the matter calls for such reference; and if so, the court may appoint a suitable person as auditor. The auditor so appointed shall be sworn or affirmed to perform his duties with fidelity, and shall have power to administer oaths or affirmations to parties and witnesses in the matter referred to him.

NOTE.—This is Section 1 of the Act of April 14, 1835 P. L. 275, 1 Purd. 1126, altered by confining it to counties having no separate orphans' courts, by providing for the appointment of one auditor only and by omitting the proviso, which reads: "*Provided*, That the provisions of this section shall not extend to the city and county of Philadelphia," and was extended to Montgomery County by the act of February 18, 1869, P. L. 183. The provision for appointment of auditors by the parties has also been omitted, and some changes have been made in the phraseology.

The provisions of this clause supersede Section 16 of the Act of March 29, 1832, 1 Purd. 1126, which is therefore recommended for repeal.

The Commissioners recommend the repeal, so far as relates to the orphans' court, of the Act of April 1, 1909, P. L. 95, 6 Purd. 7296, as to choice of auditors, etc.; by the parties (held unconstitutional in Hick's

Estate, 19 Dist. Rep. 410) ; and the Act of June 4, 1879, P. L. 84, 1 Purd. 390, as to compensation of auditors.

See form 82.

551. REVIEW OF ACCOUNTS, ADJUDICATIONS AND AUDITORS' REPORT.

SECTION 48. Within five years after the final decree, confirming the original or supplementary account of any fiduciary, which has been or may be hereafter passed, upon petition of review being presented by such fiduciary or his legal representatives, or by any person interested therein, alleging errors in such account, or in any adjudication of the orphans' court or any report of an auditor on such account, which errors shall be specifically set forth in said petition of review, said petition and errors being verified by oath or affirmation, the orphans' court shall grant a rehearing of so much of said account, adjudication, or auditor's report, as is alleged to be error in said petition of review, and give such relief as equity and justice may require, by reference to auditors, or otherwise, with like right of appeal to the proper appellate court as in other cases: *Provided*, That this act shall not extend to any cause when the balance found due shall have been actually paid and discharged by any fiduciary.

NOTE.—This is Section 1 of the Act of October 13, 1840, P. L. (1841) 1, 1 Purd. 1128, changed by substituting the words "proper appellate" for "supreme," and by omitting "as aforesaid" after "hereafter passed."

The word "fiduciary" is substituted for "executor, administrator or guardian," making the act include testamentary trustees. A provision is inserted making the review include adjudications and auditors' reports.

See forms 83, 84.

Under Section 48 of the Act of June 7, 1917, P. L. 514, the orphans' court may revise and correct a former adjudication where it appears that such adjudication contained a mistake by the parties and the rights of third parties have not intervened.

The orphans' court is not bound by the rules of practice which prevail in a court of Chancery.

"The rule governing application for bills of review, laid down in our decisions since the passage of the Act of October 13, 1840, P. L. (1841) 1, Sec. 1, giving the court authority to grant a review, now controlled by the Act of June 7, 1917, P. L. 514, Sec. 48 has been re-asserted by Judge GERR in Nixon's Estate, 239 Pa. 270, 273, which was affirmed on his opinion wherein he said: 'It is well settled that a petition for a review of an account settled and confirmed in the orphans' court must show either an error of law apparent on the face of the record or else new matter

which has arisen since the decree, or such review may be allowed *ex gratia* upon the subsequent discovery of new evidences to the facts upon which the decree was grounded which could not have been procured by the use of due diligence." *SCHAEFFER*, P. J., in *Beard's Est.*, 34 York 190.

Section 48 of the Fiduciaries Act of June 7, 1917, P. L. 477, 514, relating to petitions of review, is an advance on Section 1 of the Act of October 13, 1840, (P. L. 1841, page 1), treating of the same subject, in that the former requires a review to be granted if error is made in the adjudication.

Where an error appears in an adjudication, and the balance found due has not been actually paid and discharged, a rehearing is a matter of right, unless, at the audit, the question at issue was raised, contested and decided adversely to petitioner.

The orphans' court has inherent power to and should grant a review, aside from the provisions of either act, where justice and equity require it and no one will suffer by reason thereof. *Troutman's Est.* 270 Pa. 310.

The Act of October 13, 1840, P. L. (1841) page 1, as amplified by the 48th Sec. of the Fiduciaries Act of 1917, P. L. 514 gives the orphans' court jurisdiction to review and revise an account within five years after confirmation upon petition of review being presented; and under this jurisdiction and the general equity powers of the orphans' court a matter being duly before the court an order may be made for the re-statement of the fiduciary's account, where the circumstances and equity require it, although no petition for review has been filed. *Bender's Est.*, 33 York 125.

Decedent died leaving a will, bequeathing certain specific legacies to a church, also the residue of her estate to said church. One of the witnesses to the will was a member of the congregation. The account of the executor was duly filed, audited and confirmed, and distribution made to the testamentary trustee.

About one year after the filing of the account by the testamentary trustee, and after distribution had been made under the terms of the will, the petitioner and next of kin filed his petition asking that the confirmation of the adjudication be vacated and for restitution of awards.

"It was well settled under the law that, in order to open an adjudication after distribution has been made, unless there is an apparent error of law on the record or fraud be shown to have entered into the decree or induced it, that no review of the adjudication will be allowed. In this case there is no error of law appearing on the face of the record, no new matter has arisen since the adjudication, and no new evidence which was not in the control of the petitioner, or could by due diligence have been procured and offered before the adjudication no fraud being shown, and the fund having been paid and record satisfied, the petition must be dismissed."

Hiser's Est., 35 Montg. 169.

The decedent died possessed of 110 shares of the common stock of the A Company, which, on March 16, 1914, was adjudged a bankrupt and petitioner became trustee. On Oct. 9, 1914, the executors filed their account, which was confirmed absolutely Oct. 24th, and, then, transferred the fund to two of their number as trustees; the third, who was a non-resident, was discharged Nov. 10th. In August, 1919, the trustee in

bankruptcy filed this petition, alleging the above facts and, *inter alia*, that shortly after he became trustee he applied to the United States District Court for the levy of an assessment on all holders of unpaid common stock of the A Company to raise funds to meet its corporate indebtedness, and that, Nov. 7, 1918, the Court levied an assessment of 45.2 per cent. amounting to \$4,972, against the decedent. The petitioner, therefore, prayed that the adjudication of the executors' account be opened, the confirmation set aside, and a readjudication made thereon, awarding the trustee said sum, with interest from Nov. 7, 1918. On demurrer: Held, that as the corporation knew at the time of the audit that the stock held by the decedent had not been paid for and that an assessment would be necessary to pay creditors, the facts alleged in the petition did not constitute new matter, and, hence, the petitioner was not entitled to present his claim, and the petition should be dismissed. *Graham's Est.*, 48 Pa. C. C. 371, 28 Dist. 1023.

552. DISTRIBUTION OF ESTATES,—NOT TO BE COMPELLED WITHIN SIX MONTHS; AFTER SIX MONTHS MAY BE ORDERED ON PETITION OF CREDITOR OR ANY PERSON INTERESTED.

SECTION 49. (a) No executor or administrator shall be compelled to make distribution of the estate of his testator or intestate until six months be fully expired from the granting of the letters testamentary or of administration in the estate. After the expiration of said period, distribution may be ordered by the orphans' court having jurisdiction of the accounts of the executor or administrator, on petition of any person having an interest in the assets to be distributed, or on petition of any creditor of the decedent.

NOTE.—This is a modification of Section 38 of the Act of February 24, 1834, 1 Purd. 1130, which related to administrators only. It was copied from Section 15 of the Act of April 19, 1794, 3 Sm. L. 143, except that under the Act of 1794 the year ran from the death of the intestate.

The period has now been reduced to six months. Section 47 of the Act of 1834, 1 Purd. 1131, which is set forth below, after clause (d), applied to executors.

The Commissioners recommend the repeal of the first part of Section 19 of the Act of March 29, 1832, P. L. 194, 1 Purd. 1127, providing for the appointment of auditors in insolvent estates "to settle and adjust the rates and proportions of the assets to and among the respective creditors, according to the order established by law," and the last part of Section 1 of the Act of April 13, 1840, P. L. 319, 1 Purd. 1127, providing for the appointment of auditors to make distribution on the application of any legatee, heir or other person interested.

One who has a *prima facie* claim against the estate of a decedent is entitled to require an account by personal representatives.

The orphans' court will not deny a creditor of a decedent the right to proceed to have his claim adjudicated in that court and relegate him to his common law action.

"Section 49a of this Act provides that after the expiration of six months distribution may be ordered by the orphans' court 'On petition of any person having an interest in the assets to be distributed, or on petition of any creditor of the decedent.'

"The question presented is whether the petitioner (a creditor) has sufficiently shown himself to be a creditor so as to be entitled to compel the filing of an account. The rights of creditors seem to be the same under the Fiduciaries Act as they were under the prior existing law."

Laverty's Est., 24 Dauphin 107, 30 Dist. 507, 50 Pa. C. C. 259.

See also Cooper's Est., 29 Dist. 230, 67 P. L. J. 17, 36 Lanc. 266, 20 Lack. 46, 32 York 144.

553. DISTRIBUTION WITHOUT AUDIT OF ACCOUNT AT RISK OF EXECUTORS OR ADMINISTRATORS; DISTRIBUTION UNDER ORDER OF COURT TO PROTECT EXECUTORS OR ADMINISTRATORS AND TO BE WITHOUT REFUNDING BONDS.

(b) Executors or administrators may make distribution, and pay or deliver legacies, without the audit of their accounts, upon such security as may be satisfactory to them, nevertheless at their own risk, but without liability to any creditors of the decedent who shall not have given written notice to the executor or administrator within six months after the granting of letters testamentary or of administration, provided that such executor or administrator has complied with the provisions of Section 10 of this Act.¹ Where distribution of a decedent's estate is awarded by the orphans' court, after audit and confirmation of any account of the executors or administrators, such decree of distribution shall protect the executors or administrators from personal liability with respect to the property so distributed. In making distribution under such a decree, the executors or administrators shall not be entitled to demand refunding bonds from the distributees, except in the cases specially provided for by this act, and in other cases in which the court shall direct the giving of refunding bonds.

¹See 397 *supra*.

NOTE.—This is a new clause. The first sentence is founded upon Section 58 of the Act of 1834, 1 Purd. 1132, which was derived from Section 16 of the Act of 1794. It is here altered by substituting “the audit of their accounts” for “application as aforesaid,” and by adding the words beginning “but without liability.”

The remainder of the section as drafted is declaratory of the law as laid down in the decisions: *Ferguson v. Yard*, 164 Pa. 586; *Lejee's Estate*, 5 D. R. 311; *Piper's Estate*, 208 Pa. 636.

Section 57 of the Act of 1834, 1 Purd. 1131, provides: “Executors, or administrators making distribution, or paying or delivering any legacies as aforesaid, shall not be liable for the assets so paid or distributed in respect to any claim or demand upon the decedent not previously made known to them, where security shall be taken, as is hereinbefore provided.” This, eliminating the requirement of security, is covered by the new clause.

Section 41 of the Act of 1834, 1 Purd. 1131, which required refunding bonds to be given by distributees in all cases, has become obsolete and its repeal is recommended. It was derived in part from Section 15 of the Act of 1794.

¹ See 391 *supra*.

Section 49 (b) of the Fiduciaries Act of June 7, 1917, P. L. 447, makes it necessary for creditors of a decedent to give an executor or administrator written notice of their claims “within six months after the granting of letters” where notice of death has been given by publication.

The court, in declining to audit, raised the following question, which, however, it did not decide:

“Attention is called to the first half of Section 49 (b), which makes it necessary for creditors to give to the fiduciary written notice of their claims “within six months after the granting of letters,” where the fiduciary has duly published notice thereof, and relieves the executor or administrator from all liability to the creditor if this notice is not given. Under this section these queries arise: (a) Has not the legislature given to the fiduciary the right to distribute to those creditors only who have given written notice of their claims, and to any other distributees without audit? (b) How may a creditor who has failed to give the statutory notice of his claim, compel an accounting by virtue of the right given to him under Sec. 46 (a) and Sec. 49 (a), if the fiduciary has distributed all of the assets to those who have complied with the law? Has a creditor who has failed to give this notice, which, under the other sections of the Act regulating an orderly administration, followed by advertisement of the accounting, audit, confirmation, and equitable distribution, is not required, any longer any standing as a creditor, if distribution has been made, and is the fiduciary not entitled to a decree of confirmation, because under Sec. 46 (a) it is the duty of every executor to account? The exemption from liability given by this section to the fiduciary is new in the law of Pennsylvania, and referred to only because it is necessary to expressly distinguish between the questions which may arise in determining the rights of parties thereunder, and those under the other sections of the Act which are cited and relied upon as the basis of the decree to be entered in

this case." TRIMBLE, J., in *Cooper's Est.*, 29 Dist. 230, 67 P. L. J. 17, 36 Lanc. 266, 20 Lack. 46, 32 York 144.

Under the *Fiduciaries Act* of June 7, 1917, P. L. 447, the account of an executor or administrator should not be filed until the expiration of six months from the date of the first insertion of the advertisement of the grant of letters. The act contemplates an immediate advertisement, and if the account be filed within six months of the first insertion of the advertisement, the auditing judge may withhold confirmation.

While the act introduced no innovation in the law touching the advertisement of the grant of letters, it shortened the period allowed for administration from one year to six months, and, hence, it becomes necessary for the court to see that creditors have had due notice of the grant of letters.

Creditors have the right to assume that the account need not be looked for until six months have expired from the first insertion of the advertisement. *Cotter's Estate*, 27 Dist. 1023, 67 P. L. J. 19, 47 Pa. C. C. 76.

554. DISTRIBUTION OF ESTATE NOT EXCEEDING THREE HUNDRED DOLLARS.

(c) When the personal estate of a decedent does not exceed the value of three hundred dollars, the executor or administrator may, after the expiration of one year after the date of granting the letters testamentary or of administration, present his petition to the proper orphans' court, with an annexed account showing the administration and legal distribution of the estate, the statements in the petition and the account to be verified by the affidavit of such executor or administrator. Thereupon the court may, upon satisfactory proof or acknowledgment of notice to all parties known to be interested in said estate that said petition and account have been presented, order, at the end of thirty days from the date of filing the petition and account, the discharge of the executor or administrator and his sureties from future liability, without the expense of proceedings as in a formal account, unless during said period of thirty days exceptions be filed to the account.

NOTE.—This is Section 1 of the Act of May 6, 1915, P. L. 265, 5 *Purd.* 5895, changed by inserting "personal," in the first line, by adding "and his sureties from future liability," and by altering the language at the end, so as to make it clear that discharge may be made at the end of the thirty days, unless meanwhile exceptions are filed.

555. CREDITOR FAILING TO PRESENT CLAIM AT AUDIT NOT ENTITLED TO SHARE IN DIS- TRIBUTION.

(d) No creditor of a decedent who shall neglect or refuse to present his claim at the audit of the account of the executor or

administrator, held not less than six months after the grant of letters testamentary or of administration of which public notice has been given as provided in Section 10 of this act,¹ or at an audit held after actual notice to such creditor of the filing of such account, as provided in Section 46, clause (c) of this act² shall be entitled to receive any share of the assets distributed in pursuance of such audit, whether the estate of the decedent be solvent or insolvent.

NOTE.—This is founded on the proviso to Section 19 of the Act of March 29, 1832, P. L. 194, 1 Purd. 1127, which has been redrafted to correspond to the changes made in previous sections.

The Commissioners recommend the repeal of the following sections of the Act of February 24, 1834, as obsolete and unnecessary:—

Section 39, 1 Purd. 1130, providing that when distribution shall be required by any person interested, the executor or administrator shall present to the court “a statement of all demands against the estate which have been made known to him, and after deducting the amount thereof from the assets in his hands, together with such further sum as may be necessary to pay the interest and costs of suit of such as may be in dispute, and of such as he may deem it his duty to dispute, make distribution of the residue under the direction” of the court.

Section 40, 1 Purd. 1131, providing that after six months from a distribution made as aforesaid, like proceedings may be had for distribution of further assets, and so from time to time, until the whole estate shall be distributed.

Section 47, 1 Purd. 1131, providing that after one year from the granting of administration, executors shall, on the requisition of any legatee or any other person interested, pay and deliver, under the direction of the court, all legacies due and payable, or a proportionate part thereof, first deducting all demands against the estate and such sums as may be necessary to pay the interest and costs of such as are disputable or in dispute, and shall also distribute any residue distributable under the intestate laws.

¹See 391 *supra*.

²See 541 *supra*.

Where a legatee presented claim for moneys alleged to be due from executor of an estate, before an auditor appointed to distribute the balance on the account of the administratrix of such executor and no amount was given and no testimony was presented in support of the claim and the auditor did not allow the claim and no exceptions were taken to his report it was held the matter might be treated as *res judicata*.

Where more than twenty-one years have elapsed from the time moneys due legatees are payable, a legal presumption of payment arises, which must be met and overcome by evidence to the contrary, which is direct, positive and conclusive. *Feigley's Est.*, 35 York 17.

See also *Cooper's Est.*, 29 Dist. 230, 67 P. I. J. 17, 20 Lack. 46, 36 Lanc. 266, 32 York 144.

556. DISTRIBUTION IN KIND,—COURT MAY DIRECT DISTRIBUTION OF UNCONVERTED SECURITIES.

(e) 1. Whenever it shall appear at the audit and distribution of an estate in the orphans' court, that the balance, after payment of debts, includes stocks, bonds, or other securities, which, for reasons satisfactory to said court, have not been converted by the accountants, it shall be lawful for said court to direct distribution of such assets in kind to and among those lawfully entitled thereto, including fiduciaries.

NOTE.—This is Section 1 of the Act of June 10, 1911, P. L. 870, 5 Purd. 5895, with the addition of the words "including fiduciaries."

"Where the residue of the estate consists of stocks and various trust funds are created by the will, it is a proper case for the executors to present a petition under section 49 (e) of the Fiduciaries Act, 1917, P. L. 447, authorizing them to distribute the stocks in kind to the trustees. The date of the confirmation of the auditor's report fixes the value of the stock which is to be transferred.

Where the court is asked to make a distribution in kind under the above act, a schedule should be presented giving the court full information as to the number of shares of stock to be distributed and the market value of the same, and the distribution which the trustees in their judgment think should be made. That schedule can then be either adopted by the court or modified. *Skeer's Est.*, 30 Dist. 542, 17 North, 302, 49 Pa. C. C. 535.

Under the Fiduciaries Act of June 7, 1917, it is within the discretion of the orphans' court to distribute unconverted assets in kind.

Where the record did not show any effort had been made to sell unconverted assets in the hands of an accountant in a decedent's estate, but did show that the beneficiaries or distributees under the will had agreed to accept in kind, and it appeared that the assets could not be equally distributed, the Court ordered a public sale and a return of the proceeds. *Shaw's Est.*, 65 P. L. J. 830.

See also *Evans' Est.*, 30 Dist. 253, 50 Pa. C. C. 241.

557. DUTY OF FIDUCIARY TO WHOM SUCH DISTRIBUTION IS MADE; APPLICATION TO COURT FOR AUTHORITY TO SELL.

2. Where stocks, bonds, or other securities have been distributed in kind, as above provided, to any fiduciary, it shall be the duty of such fiduciary to use reasonable diligence in converting such securities as shall not be investments now or hereafter authorized by law; and if such fiduciary be doubtful as to the propriety of making sale of such securities, he may apply to the orphans' court having jurisdiction of his accounts, by petition,

for authority and direction to sell the same; whereupon, after due notice to all parties interested, the said court shall make such order in the premises as to it may appear proper.

NOTE.—This is Section 2 of the Act of 1911, with the substitution of the word “fiduciary” for “guardian, trustee, or other fiduciary,” and some slight verbal changes.

This section is intended to cover the case where securities distributed in kind to a fiduciary are not legal investments but their immediate sale would result in substantial losses and the fiduciary might, except for the provisions of this section, be compelled to make the sale forthwith on his own responsibility.

Section 3 of the Act of 1911 validated previous distributions and its reenactment is unnecessary.

558. DISTRIBUTION BY EMPLOYER OF WAGES DUE DECEDENT NOT EXCEEDING \$75.

(f) It shall be lawful for any employer in this commonwealth at any time not less than thirty days after the death of his employee to pay all wages due to such deceased employee to the wife, children, father or mother, sister or brother (preference being given in the order named) of the deceased employee, without requiring letters testamentary or of administration to be issued upon the estate of said deceased employee, where such wages due do not exceed seventy-five dollars¹ in amount. If such deceased employee shall not leave a wife or any of said relatives surviving him, then it shall be lawful for the employer in like manner to pay such wages to the creditors of the decedent, as follows: undertaker, physician, boarding-house keeper, and nurse, each his or her pro rata share, upon affidavit of fact furnished. The payment of such wages as aforesaid shall be a full discharge and release to the employer from any further claim for such wages.

NOTE.—This is founded on the Act of May 23, 1907, P. L. 201, 7 Purd. 7729.

¹Increased to one hundred and fifty dollars by Act of March 26, 1919 (P. L. 22).

559. REFUNDING BONDS,—FIDUCIARY WHO HAS GIVEN BOND MAY REQUIRE BONDS FROM PERSONS TO WHOM HE MAKES PAYMENT.

SECTION 50. (a) Where any fiduciary has been required, or hereafter shall be required, upon the receipt of money, to give a refunding bond, it shall be lawful for such fiduciary, upon paying

over such money to creditors, or to parties beneficially interested, to require, under the direction of the orphans' court having jurisdiction of his accounts, a bond, refunding receipt or other obligation from each person receiving such money, to indemnify such fiduciary to the amount such person may receive.

NOTE.—This is Section 1 of the Act of April 13, 1859, P. L. 604, 1 Purd. 1132, modified by substituting "fiduciary" for "executor, administrator or guardian," and "the parties beneficially interested" for "heirs, legatees or ward."

The Act of June 10, 1881, P. L. 106, 1 Purd. 1132, note (m) amended the Act of 1859 by adding a clause authorizing a ward who had reached lawful age and was a married woman to give her own refunding bond. This is now omitted as unnecessary since the married women's acts. For the same reason, Section 4 of the Act of April 11, 1856, P. L. 315, 3 Purd. 2454, authorizing a married woman entitled to a legacy or distributive share to give a refunding bond and to execute all other instruments and perform all other acts on payment to her of moneys so distributed, is recommended for repeal.

560. LIMITATION OF ACTIONS ON REFUNDING BONDS.

(b) In all cases where refunding bonds shall be given upon the distribution of the estate of any decedent, no action or suit thereon shall be brought after the expiration of six years from the date of such bond: *Provided*, That where the creditors or other persons entitled to the protection of said bonds, shall be within the age of twenty-one years, non compos mentis, imprisoned, or from or without the United States of America, or where a creditor whose debt shall not mature within such period, shall file within the said period in the office of the clerk of the orphans' court where said distribution shall have been made, a copy of particular statement of any bond, covenant, debt or demand upon which his claim arises, then and in any such cases an action may be brought by the creditor at any time not exceeding two years from the coming of age, or removal of such disability of the creditor or other person entitled to the protection of said bonds, or the maturing of the debt or demand aforesaid.

NOTE.—This is Section 1 of the Act of June 30, 1885, P. L. 203, 1 Purd. 1132. The only changes are to omit after "distribution" in line 2, the words, "or partition," to substitute "the orphans' court where said distribution shall have been made" for "said court," no court having been previously referred to, and to insert "or other persons entitled to the

protection of said bonds," and to make the period of limitation six years instead of five.

Section 2, which gave five years from the passage of the Act to sue on bonds theretofore given, need not be reenacted.

561. TRANSCRIPTS OF BALANCES DUE BY FIDUCIARIES, FILING TRANSCRIPTS IN COMMON PLEAS AND EFFECT THEREOF; EXECUTIONS.

SECTION 51. (a) It shall be the duty of the prothonotaries of the courts of common pleas to file and docket, whenever the same shall be furnished by any parties interested, certified transcripts or extracts from the record showing the amount appearing to be due from, or in the hands of any fiduciary, on the settlement of his accounts in the orphans' court of the same or any other county, or by virtue of a decree of said court, which transcripts or extracts, so filed, shall constitute judgments, which shall be liens against the real estate of such fiduciary from the time of such entry until payment, distribution or satisfaction. Executions may be issued thereon out of said court of common pleas against the real estate only of such fiduciary, by any person or persons interested, for the recovery of so much as may be due to them respectively. The liens of such judgments shall cease at the expiration of five years from the time of the entry aforesaid, unless revived by scire facias in the manner by law directed in the cases of judgments in the courts of common law.

In case of an appeal from the orphans' court, the judgment shall be for no more than the amount finally decreed by the appellate court to be due, and it shall be the duty of the prothonotary of the common pleas, on such decree of the appellate court being certified to him, to enter on his docket the amount so found due and decreed by the appellate court. If such amount be greater than that decreed by the orphans' court, the judgment for such excess shall take effect only from the time of entering the decree of the appellate court; but if the amount be reduced by the final decree of the appellate court, the prothonotary shall reduce the amount originally entered on his judgment docket and index accordingly; and such final decree, upon appeal, being certified and filed in said court of common pleas, the said term of five years shall be counted from the time of such entry.

NOTE.—This is Section 29 of the Act of March 29, 1832, 1 Purd. 1128 (Section 30 of the Commissioners' Draft), as amended by Section 1 of the Act of April 27, 1909, P. L. 202, 5 Purd. 5894.

The section is now changed by omitting "of the respective counties" after "common pleas" in line 2, by substituting "the" for "any" before "orphans' court" in line 7, and by inserting "of the same or any other county" after "orphans' court," the purpose of these changes being to permit the filing of transcripts in other counties, thus supplying, so far as it relates to the orphans' court, the Act of June 5, 1885, P. L. 78, 2 Purd. 1426.

The section is further altered by substituting "fiduciary" for "executor, administrator, guardian, or other accountant," by inserting the words "or by virtue of a decree of said court," "which shall be liens" and "the real estate of," by striking out the provisions as to execution, attachment, and actions of debt and scire facias, and inserting "and executions may be issued thereon out of said court of common pleas against the real estate only of such fiduciary." The Commissioners have considered it proper to recommend these changes so that the remedy against real estate shall be exclusively in the common pleas and executions against personalty shall issue from the orphans' court only. Corresponding changes are recommended in the Orphans' Court Act, and a similar section has been there drafted to permit the filing in the common pleas of transcripts of orders of the orphans' court for the payment of money by others than fiduciaries (see 148 *supra*.)

Section 29 of the Act of 1832 was derived, as to the first part, from Section 2 of the Act of April 1, 1823, P. L. 286. The provisos were new in the Act of 1832.

The Act of 1909 amended Section 29 of the Act of 1832 so as to provide that the transcripts should constitute "judgments" instead of "liens," and so as to provide for execution and attachment execution thereon. The Commissioners recommend the repeal of the Act of 1909, except as to the validating provisions, etc., added by the Act of 1909, as follows:

"And all executions, attachment execution, and other process heretofore issued out of any of the courts of common pleas of this commonwealth, upon any such certified transcripts or extracts from any of the orphans' courts of this commonwealth, if otherwise valid, and if otherwise duly issued and served as provided by law, are hereby declared to be, and shall be deemed and held to be lawful and valid, and no defendant, garnishee, or other person shall be permitted to make or take any objection, exception, plea, or defense to the same; nor shall any objection, exception, plea, or defense heretofore made to the same be deemed lawful, valid, or effectual, because or on the ground that there was at the time of issuing any such process, as aforesaid, no sufficient or valid judgment upon which such process might be issued; and the provisions hereof shall be held applicable to all actions, suits, and proceedings heretofore commenced or instituted, as well as to all such actions, suits, and proceedings as shall be hereafter commenced or instituted; *Provided, however,* That nothing herein contained shall apply to or affect any actions, suits, or proceedings heretofore commenced or instituted, and upon which final judgment or decree of the supreme or superior court has been entered, or as to which any court of common pleas has entered its judgment or decree, and the time for an appeal therefrom has elapsed."

562. SATISFACTION AND DISCHARGE OF JUDGMENTS ON TRANSCRIPTS.

(b) When the fiduciary shall have fully paid and discharged the amount of such judgment, the parties who have received payment shall acknowledge satisfaction thereof, on the record of the court of common pleas. In case of neglect or refusal so to do, for the space of thirty days after request in writing and tender of all the costs, the orphans' court, on due proof to them made that the entire amount due from such fiduciary, according to the final settlement of the said account, has been fully paid and discharged, may make an order for his relief from such recorded judgment, which order, being certified to the court of common pleas, shall be entered on their records, and shall operate as a full satisfaction and discharge of such judgment.

NOTE.—This is Section 30 of the Act of March 29, 1832, 1 Purd. 1128 (Section 31 of the Commissioners' Draft), as amended by Section 2 of the Act of April 27, 1909, P. L. 202, 5 Purd. 5894.

Section 30 was new in the Act of 1832. The change made by the amendment of 1909 was merely to substitute "judgment" for "lien." The term "fiduciary" is now substituted for the words "executor, administrator, guardian, or other accountant," and "operate" for "inure and be received." The words "to the extent of what they have received" are omitted after "thereof" in line 4. The provision for a penalty of fifty dollars and damages for neglect or refusal to satisfy has been omitted, the remedy in the orphans' court being considered sufficient.

**563. DISCHARGE OF FIDUCIARIES AND SURETIES,
—CONDITIONS OF DISCHARGE.**

SECTION 52. (a) Any fiduciary whose accounts shall have been settled and confirmed and who shall have paid and transferred the remainder of the property in his hands to his successor in the administration or trust, if any, or to the persons legally entitled thereto, may, on petition, be discharged by the orphans' court having jurisdiction of his accounts from the duties of his appointment; and his sureties may be discharged from future liability with respect thereto: *Provided*, That in every case of the petition of a guardian for his discharge during the minority of his ward, it shall be the duty of the court to appoint some suitable person to appear and act for the ward in respect thereto.

NOTE.—This is a combination of Section 21 of the Act of March 29, 1832, 1 Purd. 1138, and Section 11 of the same act, 1 Purd. 1087, relating to discharge of guardians. The phraseology is altered and the section

is extended to testamentary trustees. The provision as to discharge of sureties has been added.

Section 21 of the Act of 1832 was derived from the first paragraph of Section 3 of the Act of April 4, 1797, 3 Sm. L. 296. Section 11 was founded on Section 4 of the Act of March 30, 1821, P. L. 153.

See forms 86-90.

564. DISCHARGE OF ONE OR MORE JOINT FIDUCIARIES.

(b) Whenever one or more of several joint fiduciaries shall die or be discharged or removed by the proper orphans' court, the said court, upon the application of any party interested, shall have power to discharge from future liability said discharged or deceased fiduciary and his surety or sureties, and require new or additional security of the remaining fiduciary or fiduciaries, with a like result in case of failure to comply as is provided by this act when new or additional security is, for any cause, required by such court: *Provided*, That such discharge shall not affect liabilities existing at the time of the discharge of such fiduciary or fiduciaries, surety or sureties.

NOTE.—This is Section 1 of the Act of February 2, 1853, P. L. 31, 1 Purd. 1138, changed by extending it to all fiduciaries instead of administrators only. Various alterations have been made in the phraseology, especially by substituting "security" for "surety."

565. REMOVAL OF FIDUCIARIES,—GROUNDS FOR REMOVAL.

SECTION 53. (a) Any orphans' court having jurisdiction of the accounts of executors, administrators, guardians or trustees shall have exclusive power to remove such executor or administrator and vacate the letters testamentary or of administration or to remove such guardian or trustee, as the circumstances of the case may require, in any of the following cases:

NOTE.—In this section, there have been collected all the various causes for removal by the court of executors, administrators, guardians and trustees.

In line 3, the word "exclusive" has been inserted, in order to take away the seldom-exercised concurrent jurisdiction of the court of common pleas to remove testamentary trustees. This involves the repeal of Section 12 of the Act of March 11, 1836, P. L. 79, 4 Purd. 4887, and of Sections 16 to 21 inclusive of the Act of June 14, 1836, P. L. 633, 4 Purd. 4887-8, the latter, however, only so far as they relate to testamentary trustees. The

proviso (see Sec. 574 *infra*), is added to save the jurisdiction of the court of common pleas in pending cases.

See Miller's Est., 264 Pa. 310, 107 Atl. 684; Buch's Est., 35 Lanc. 41; Kelly's Est., 28 Dist. 87.

That an executor is ignorant, irresponsible and intemperate, is not a reason for his removal where the testator was well acquainted with his habits. One may be uneducated, financially irresponsible and a tippler and yet be competent to administer an estate. Buch's Est., 35 Lanc. 41.

566. WASTE OR MISMANAGEMENT; PROBABLE INSOLVENCY; FAILURE TO FILE INVENTORY OR ACCOUNT.

1. When such fiduciary is wasting or mismanaging the estate or property under his charge, or is like to prove insolvent, or has neglected or refused to exhibit true and perfect inventories, or render full and just accounts of such estate or property, come to his hands or knowledge;

Paragraph 1 is derived from Section 22 of the Act of March 29, 1832, 1 Purd. 1139, with the substitution of the word "mismanaging" for "misplacing;" Section 1 of the Act of April 22, 1846, P. L. 483, 1 Purd. 1142; Section 1 of the Act of April 7, 1859, P. L. 406, 1 Purd. 1143, which extended the Act of 832 to cases of trustees; and Section 1 of the Act of May 1, 1861, P. L. 680, 1 Purd. 1141.

It cannot be said that the court abuses its discretion in removing an executor for mismanagement of the estate where he admits that he had failed to pay the debts of the decedent and the taxes levied against the estate, and that he had misappropriated a portion of the rentals, made assets for payment of debts, and fails to make any satisfactory explanation of his actions.

"It is provided by the 53d section, clause A, (1) of the Fiduciaries Act, that the orphans' court having jurisdiction of the accounts of executors shall have power to remove such executor, 'when such fiduciary is wasting or mismanaging the estate in his charge,' or 'where for any reason the interests of the estate or property are likely to be jeopardized by the continuance of said fiduciary.

"The executor who pays out the moneys of an estate for purposes not authorized by law is wasting and mismanaging the estate as much as one who converts the money of the estate to his own use. It is the bounden duty of the court to hold a fiduciary to a strict account of his management."

From opinion of lower court affirmed in Miller's Est., 264 Pa. 310, 107 Atl. 684. See also Buch's Est., 35 Lanc. 41; Kelly's Est., 28 Dist. 87.

567. LUNACY, DRUNKENNESS, OR WEAK-MINDED-NESS.

2. When such fiduciary has been duly declared a lunatic, habitual drunkard or weak-minded person;

Paragraph 2 is derived from Section 26 of the Act of 1832, 1 Purd. 1140, with the addition of the words "or weak-minded person."

568. SICKNESS OR PHYSICAL OR MENTAL INCAPACITY.

3. When such fiduciary has become incompetent to discharge the duties of his trust, by reason of sickness or physical or mental incapacity, and it shall appear to the satisfaction of the court that such incompetency is likely to continue, to the injury of the estate under his control;

Paragraph 3 is derived from Section 2 of the Act of May 1, 1861, P. L. 680, 1 Purd. 1142, with some changes in phraseology, the omission of the word "sole," and the substitution of "other cause" for "other visitation."

See Buch's Est., 35 Lanc. 41.

569. REMOVAL FROM THE STATE.

4. When such fiduciary has removed from this state, or has ceased to have any known place of residence therein, during the period of one year or more;

Paragraph 4 is derived from Section 27 of the Act of 1832, 1 Purd. 1140.

Kelly's Est., 28 Dist. 87.

570. MISMANAGEMENT OR MISCONDUCT BY GUARDIAN.

5. When any guardian, whether testamentary or otherwise, mismanages the minor's estate or misconducts himself in respect to the maintenance, education or moral interests of the minor;

Paragraph 5 is derived from Section 12 of the Act of 1832, 1 Purd. 1087.
See Cook's Est., 48 Pa. C. C. 599; (S. C. sub nom. Kerr's Petition) 29 Dist. 909.

571. FAILURE TO PAY OVER PRINCIPAL OR INCOME OR TO COMPLY WITH ANY ORDER OF COURT.

6. When such fiduciary fails or neglects to pay over the principal or income of the estate, according to his duty under the

trust, or fails or neglects to comply with any order or direction of the court made in relation to said trust;

Paragraph 6 is derived from Section 1 of the Act of April 7, 1859, P. L. 406, 1 Purd. 1143.

See Kelly's Est., 28 Dist. 87.

**572. NEGLECT OR ABUSE OF TRUST BY TRUSTEE
FOR RELIGIOUS, EDUCATIONAL OR
CHARITABLE PURPOSES.**

7. When any trustee of property held in trust under the provisions of any last will and testament for religious, educational or charitable purposes, or for use as a burying-ground, neglects or abuses such trust;

Paragraph 7 is derived from Section 1 of the Act of February 17, 1818, P. L. 104, 4 Purd. 4886.

**573. PROBABLE JEOPARDY OF INTERESTS OF ES-
TATE.**

8. When, for any reason, the interests of the estate or property are likely to be jeopardized by the continuance of any such fiduciary.

Paragraph 8 is derived from Section 1 of the Act of May 1, 1861, P. L. 680, 1 Purd. 1141.

See Miller's Est., 264 Pa. 310, 107 Atl. 684; Kelly's Est., 28 Dist. 87.

**574. WHEN ALL OR A MAJORITY OF THE CESTUIS
QUE TRUST, HAVING LIFE ESTATES, DE-
SIRE REMOVAL ON ANY SUBSTANTIAL
GROUND.**

9. When all the cestuis que trust, or a majority of them, having the life estate under any trust, shall desire the removal of the trustee or trustees upon any substantial ground not herebefore enumerated, and the court, upon petition filed by them or any of them, shall be satisfied that such substantial ground for removal exists, in which case, the court may remove said trustee or trustees and appoint another or others as chosen by said parties.

Provided, however, That nothing herein contained shall be construed to affect the jurisdiction of any court of common

pleas in proceedings pending at the date of the approval of this act.

Paragraph 9 is derived from Section 1 of the Act of April 9, 1868, P. L. 785, 4 Purd. 4893, which applies only to Philadelphia, modified so as to conform to the decision in *Neafie's Estate*, 199 Pa. 307.

This combination has been made in order to avoid unnecessary repetitions. The following clauses deal with the procedure common to all the cases above enumerated, and the next section covers the cases in which the court has power to require additional security.

575. PETITION, CITATIONS, ORDERS AND DECREES.

(b) Whenever it shall be made to appear to the orphans' court having jurisdiction of the accounts of any fiduciary, on the oath or affirmation of any person interested, that there exists any one or more of the grounds for removal of such fiduciary enumerated in the last preceding clause of this section, such court may issue a citation to such fiduciary, requiring him to appear on a day certain, to answer the charge so preferred, and may make all such necessary rules and orders as the said court may deem proper for bringing the matter complained of to a hearing. If, on such hearing, the said court shall be satisfied of the truth of the matters charged, it may remove such executor or administrator and vacate the letters testamentary or of administration or remove such guardian or trustee, as aforesaid, and direct the issuance of new letters testamentary or of administration, or appoint a new guardian or trustee, and make such orders for the security of the trust property and for the delivery of such property and the books, accounts, papers and moneys belonging or relating to the trust to the successor of such fiduciary as the circumstances of the case may require.

NOTE.—This is derived from Section 1 of the Act of May 1, 1861, P. L. 680, 1 Purd. 1141; Section 26 of the Act of 1832, 1 Purd. 1140; Section 12 of the Act of 1832, 1 Purd. 1087; and Section 1 of the Act of April 7, 1859, P. L. 406, 1 Purd. 1143.

576. SUMMARY REMOVAL IN CASES OF EMERGENCY.

(c) Any orphans' court having jurisdiction of the accounts of any fiduciary shall have power in a case of emergency, when the exigencies of the case shall appear to the satisfaction of the court to require it, in order that the rights of creditors and parties

interested in the assets of the estate shall be protected, summarily to remove such executor or administrator and vacate the letters testamentary or of administration or summarily to remove such guardian or trustee, on any of the grounds enumerated in clause (a) of this section, and to direct the issuance of new letters or to appoint a successor to such guardian or trustee, on the ex parte petition of any creditor or party interested in the estate, and further to make such orders for the security of the trust property and for the delivery of such property and the books, accounts, papers and moneys belonging or relating to the trust to the successor of such fiduciary as the circumstances of the case may require: *Provided*, That it shall be lawful for any such fiduciary, so removed, to apply by petition to said court to have such decree of removal vacated and to be reinstated in his office.

NOTE.—This clause is new and intended to supply an hiatus in the present law, which apparently does not fully provide for immediate relief where the fiduciary, for example, absconds and cannot be reached by citation or attachment.

577. DECREE REMOVING ONE FIDUCIARY NOT TO AFFECT CO-FIDUCIARIES.

(d) No decree removing one of several co-fiduciaries shall suspend the power or prejudice the acts of any of the other fiduciaries.

NOTE.—This is derived from the proviso to Section 27 of the Act of 1832, 1 Purd. 1140.

578. ENFORCEMENT OF ORDERS AND DECREES; SUITS BY SUCCEEDING FIDUCIARY.

(e) If such superseded fiduciary shall neglect or refuse to comply with any order or decree of the court made under the provisions of this section, the court shall have power to enforce obedience thereto by attachment, with or without sequestration, execution or otherwise, as to such court shall seem necessary and proper for the due protection of the rights and interests of any and all parties interested; or the succeeding fiduciary may proceed at law against the superseded fiduciary and his sureties, if any there be, or against any other person who may be possessed of any goods or chattels belonging to the estate of the decedent or minor, as the case may be, or be indebted to him; or the

remedies by execution and suit at law may be pursued at the same time, if the case so require, until the end be fully attained.

NOTE.—This is a combination of Section 24 of the Act of 1832, 1 Purd. 1139, and the last part of Section 1 of the Act of April 7, 1859, P. L. 406, 1 Purd. 1143.

579. REQUIREMENT OF SECURITY BY EXECUTOR OR ADDITIONAL SECURITY BY OTHER FIDUCIARY; PROCEEDINGS BY SURETIES TO REQUIRE COUNTER SECURITY, FOR DISCHARGE OF SURETY OR FOR REMOVAL OF FIDUCIARY,—PROCEEDINGS TO REQUIRE ADDITIONAL SECURITY,—DECREE; ATTACHMENT.

SECTION 54. (a) 1. In any of the cases enumerated in Section 53, clause (a) of this act, the court may, upon the return of the citation, require such security of an executor, or such other and further security of an administrator, guardian or trustee, as they may think reasonable, conditioned for the performance of the trust, which security shall be taken in the name of the commonwealth of Pennsylvania and filed in the said court, and shall be deemed and considered in trust for the benefit of all persons interested in such estate: *Provided*, That if it shall be made to appear to the said court that such fiduciary is about to remove from this commonwealth, or that the property under his charge may be wasted or materially injured before he can be reached by the ordinary process of the court, it shall be lawful for such court to issue a writ of attachment, under which the same proceedings may take place as in other cases of attachment on mesne process in the orphans' court; and on the return of such attachment, the court may proceed as on the return to the citation.

NOTE.—This is derived from Section 22 of the Act of March 29, 1832, 1 Purd. 1139. It is extended to all cases covered by clause (a) of Section 53 of the present draft, instead of merely the cases covered by paragraph 1 of that clause.

Section 25 of that act, 1 Purd. 1140, which was derived from the Act of March 27, 1713, 1 Sm. L. 81, provides that security may be required where "an executrix, having minors of her own, or being concerned for others, is married or like to be espoused to another husband, without securing the minors' portions or real estates." Section 1 of the Act of April 25, 1850, P. L. 569, 1 Purd. 1141, amended the above section so as to "include all cases therein specified, whether there are minors concerned in the estate or not, and whether the executrix is sole executrix or otherwise."

This amendment leaves the section applicable to any case where an executrix "is married or like to be espoused to another husband." Since the married women's acts, there seems to be no occasion for this provision. The original section was apparently intended to cover the case where a widow, named as executrix, remarried or was about to remarry, and to protect the interests of minor children of the testator against the property rights which would be acquired by the second husband. The repeal of Section 25 of the Act of 1832 and the amendment of 1850 is therefore recommended.

See Buch's Est., 35 Lanc. 41.

580. REMOVAL ON FAILURE TO COMPLY WITH DECREE.

2. If such fiduciary shall neglect or refuse to give such security, or such further security, so ordered, then the said court may remove such executor or administrator and vacate such letters testamentary or of administration, or remove such guardian or trustee, and direct the issuance of new letters or appoint a new guardian or trustee as aforesaid.

NOTE.—This is derived from Section 23 of the Act of 1832, 1 Purd. 1139. "May remove" is substituted for "shall remove."

581. PROCEEDING BY SURETY TO COMPEL GIVING OF COUNTER SECURITY.

(b) Application may be made to the orphans' court, in any of the cases mentioned in clause (a) of Section 53 of this act, by any surety on the bond of such fiduciary, and upon the petition of such surety duly verified by oath or affirmation, the like proceedings may be had, for the purpose of compelling such fiduciary to give security, and thereupon the court may order such fiduciary to give such counter-securities as they shall judge necessary to indemnify the surety against loss by reason of his suretyship. If such fiduciary shall refuse or fail to give such security, within such reasonable time as the court shall order, it shall be lawful for the court to direct such fiduciary to pay or deliver over forthwith to such surety, or to some other person for him, all of the property, moneys, books, accounts and papers whatsoever for which such surety may be accountable or which may belong or relate to the trust: *Provided*, That such surety shall first give to the satisfaction of the court, sufficient security,

faithfully to preserve and account therefor, and deliver and dispose of the same according to the order of the court.

NOTE.—This is Section 28 of the Act of 1832, 1 Purd. 1140, with some changes in phraseology, the substitution of “fiduciary” for “executor, administrator or guardian,” and the extension of the provisions to all cases covered by clause (a) of Section 53 (see 565 *supra*), instead of merely the cases covered by paragraph 1 of that clause.

582. PROCEEDING BY SURETY FOR DISCHARGE.

(c) It shall be lawful for the orphans’ court having jurisdiction of the accounts of any fiduciary, on the petition of any surety of such fiduciary, or of the personal representatives of a deceased surety, to issue a citation requiring such fiduciary, at the return thereof, not less than thirty days’ notice to be given of the presentation of such petition, to file an account of his management of the trust or estate. The said citation, upon such petition, and affidavit filed of the facts connected with the execution and position of the trust funds or estate, shall further direct the said fiduciary to show cause why the petitioner or his estate should not be discharged from all future liability, if the court, after due notice to all parties interested, deem it reasonable and proper. If the court, on due consideration, shall discharge such surety or his estate, the fiduciary shall thereupon give a new bond, with surety or sureties, as the court shall order, and on failure or refusal so to do, within such time as is ordered by the court, shall be removed from the trust, and some other person or corporation appointed. When a new bond is required under the provisions of this clause the surety in the prior bond or his estate shall be liable for all breaches of the conditions thereof committed before the new bond is approved according to law.

NOTE.—This embodies the provisions of Sections 1, 2 and 3 of the Act of June 1, 1907, P. L. 384, 7 Purd. 7701-2. Section 4 of that act is a general repealer.

The word “fiduciary” has been substituted for “trustee, committee, guardian, assignee, receiver, executor, administrator, or other fiduciary;” the provisions as to representatives of a deceased surety have been inserted; the reference to the court of common pleas has been omitted; the jurisdiction is given to the orphans’ court having jurisdiction of the accounts, instead of the court of the county of the residence of the fiduciary; “during any regular term of the court” has been omitted after “return thereof,” and the phraseology has been modified.

The Act of 1907 seems to repeal by implication the Act of May 10, 1881, P. L. 14, 4 Purd. 4914, which applied only to trusts created “to

continue for, or during, a life or lives, or marriage," and provided that the petition shall not be presented until more than three years after the appointment of the trustee.

The Act of 1881 amended Section 1 of the Act of March 27, 1865, P. L. 44, and reenacted Sections 2 and 3 of that act.

Section 1 of the Act of April 17, 1866, P. L. 111, 4 *Purd.* 4915, provided that the petition authorized by the Act of 1865 might, "in the event of the death of such sureties, or any one of them, be presented by the personal representative of such surety or sureties, with like effect in all respects, as if the petition had been presented by the deceased surety or sureties in his or her lifetime." This provision was omitted from the Acts of 1881 and 1907, but its equivalent is now included.

583. REQUIREMENT OF STATEMENT OF INVESTMENTS ON TEN DAYS' NOTICE; ACCOUNTING REMOVAL.

SECTION 55. In case any surety or sureties, or the personal representatives of any deceased surety or sureties upon the bond of any fiduciary, or any person interested in the trust, shall apply to the fiduciary for a complete and detailed statement of the nature and character of the securities in which the trust funds are invested, and the said fiduciary shall fail for the space of ten days to furnish such statement, or if, such statement having been furnished, it shall appear to the said surety or sureties, or the representatives of said surety or sureties, or other person interested in said trust, that the funds in the hands of the said fiduciary are badly invested so as to be likely to result in a loss to the trust, the said surety or sureties, or the representatives of said surety or sureties, or other person interested in the trust, may present a petition to the orphans' court having jurisdiction of said trust, praying that an order be made requiring the said fiduciary to file an account of the administration of his trust, which account shall include a complete and detailed statement of the manner and securities in which said trust funds are invested, within twenty days after service of said order, unless the time be enlarged by the court. Thereupon the said court shall make such order, and if, upon the audit of such account, it shall appear to the court that the said fiduciary has been guilty of any act of fraud or mismanagement or has invested the trust funds in securities not authorized by law or by the will of the testator, or has made investments which are likely to cause a loss to the trust, said court may remove the said fiduciary and order payment of the assets to his successor or into court.

NOTE.—This is Section 1 of the Act of June 3, 1893, P. L. 273, 4 Purd. 4915, changed by inserting "personal" and "deceased" in line 2, by substituting "fiduciary" for "trustee, committee, guardian, assignee, receiver, administrator, executor or other person having trust funds in his hands," by requiring the filing and audit of an account instead of the filing of a statement in the first instance, and by eliminating the provisions as to investments outside of the state.

The Act of 1893 should be repealed only so far as it relates to fiduciaries who are within the scope of the present act. Section 2, 4 Purd. 4916, provides: "This act shall apply to all trusts, whether the same be within the jurisdiction of the orphans' court, of common pleas, or of a court of equity." Section 3 is a general repealer.

584. APPOINTMENT OF TRUSTEES TO FILL VACANCIES; PARTIAL VACANCY IN TESTAMENTARY TRUST.

SECTION 56. (a) Whenever, by the provisions of any last will and testament admitted to probate, a trust has been or shall be declared of and concerning any real or personal estate, to be executed by a trustee or trustees named in said will or by the executor or executors of said will, whether by virtue of their office or otherwise, and any of the said executors or trustees shall die, renounce, resign, be dismissed from or refuse to act in the said trust, leaving the other executor or executors, trustee or trustees, continuing therein, it shall be lawful for the orphans' court having jurisdiction of the accounts of such executors or trustees, on the application of any party in interest, and with the consent of such continuing executor or executors, trustee or trustees, with notice to all persons interested, so far as such notice can reasonably be given, to appoint a trustee or trustees in the place of the executor or executors, trustee or trustees, so dying, renouncing, resigning, dismissed or refusing to act, and to require the person or persons so appointed to enter sufficient security for the faithful performance of the trust. The trustee or trustees so appointed shall have the same power and interest over and in the property in trust, as the executor or executors, trustee or trustees, in whose stead he or they shall be so appointed as aforesaid. It shall also be lawful for the said court to appoint a successor or successors to such trustee or trustees from time to time, whenever from death, resignation or otherwise, the same shall be necessary or expedient.

NOTE.—This is derived from Section 2 of the Act of April 10, 1849, P. L. 597, 1 Purd. 1142 (which was confined to Philadelphia, but was extended throughout the state by the Act of April 23, 1864, P. L. 550, 1

Purd. 1143) and Section 1 of the Act of April 22, 1846, P. L. 483, 1 Purd. 1142.

See forms 17, 91, 92.

"The auditing judge is of the opinion that the power to carry out the charitable purpose is not confined alone to the first named executor. It is true that in conferring this power the testator speaks of 'my executor,' using the singular number, but this the testator does because he appoints one person sole executor, and when he later appoints succeeding executors in the event of the original executor's death, etc., his apparent purpose is that, in any event, there shall be some one in the office of executor who, by virtue of their office, shall have the duty of carrying out this provision of the will as well as the duty of performing the other services required of executors. See, generally, Kershaw's Estate, 27 Dist. R. 659; Murphy's Estate, 184 Pa. 310; Sheets's Estate, 215 Pa. 164; Fiduciaries Act of June 7, 1917, Sections 28 and 56 P. L. 447."

Adjudication of THOMPSON, J., in Barnwell's Est., 49 Pa. C. C. 188, 29 Dist. 317, aff'd. in 269 Pa. 443.

585. ENTIRE VACANCY IN TESTAMENTARY TRUST.

(b) Whenever, in any of the cases enumerated in clause (a) of this section, all of the said executors or trustees shall die, renounce, resign, be dismissed from or refuse to act in the said trust, it shall be lawful for the orphans' court having jurisdiction of the accounts of such executors or trustees, on the application of any party interested, and with notice to all persons interested, so far as such notice can reasonably be given, to appoint a trustee or trustees in place of the executor or executors, trustee or trustees, so dying, renouncing, resigning, dismissed or refusing to act, and to require the person or persons so appointed to enter sufficient security for the faithful performance of the trust. The trustee or trustees so appointed shall have the same power and interest over and in the property in trust, as the executor or executors, trustee or trustees in whose stead he or they shall be so appointed as aforesaid. It shall also be lawful for the said court to appoint a successor or successors to such trustee or trustees from time to time, whenever from death, resignation or otherwise, the same shall be necessary or expedient.

NOTE.—This clause is intended to empower the court to make appointments in cases where there is an entire vacancy in the office of trustee. It follows the provisions of clause (a) so far as applicable.

A discretionary power vested in testamentary trustees *virtute officii* survives to a substituted trustee appointed by the orphans' court under the Act of April 22, 1846, Section 1, P. L. 483.

Testatrix by her will bequeathed her residue estate to her executors and trustees in trust to pay the income to B. for life, with limitations over. In a proviso, following intervening clauses she directed them to pay him \$5,000 on his attaining the age of forty, if in their discretion they deemed it well to do so, having regard to his character and ability. In a subsequent clause she appointed K. and F. executors and trustees. K. was discharged, F. died, and a trust company was appointed substituted trustee: *Held*, that the power vested in the trustees *virtute officii* and could be properly exercised by the substituted trustee.

The provisions of Section 56 (b) of the Fiduciaries Act (which repealed the Act of April 22, 1846, Section 1 (P. L. 483), do not apply to the question of the survival in substituted trustees of discretionary powers vested in the original trustee. *Kershaw's Est.*, 27 Dist. 659.

586. APPOINTMENT OF TRUSTEE WHERE EXECUTOR DECLINES TO ACT, OR IS DISCHARGED; APPOINTMENT OF SEPARATE TRUSTEES FOR SEVERAL PARTIES.

(c) In all cases of trusts created by will, and annexed to the office of executor, such executor may decline to accept the trust, or be discharged therefrom, without affecting his office of executor, and the orphans' court of the proper county shall have power to fill the vacancy by appointment; and if a trust fund or estate is committed to an executor or other trustee, in which several *cestuis que trust* have or are entitled to enjoy a separate interest, and a vacancy should in any manner occur in the office of the trustee thereof, the said court may appoint one or more trustees of such estate or fund, for each of the said *cestuis que trust*, on his or her application; and the said trustee shall give security as in other cases.

NOTE.—This is Section 1 of the Act of March (April) 13, 1859, P. L. 611, 1 Purd. 1143. The only change made is to substitute "in other cases" for "as provided by existing laws," at the end of the clause.

587. JURISDICTION OF ORPHANS' COURT TO BE EXCLUSIVE.

(d) The jurisdiction of proceedings under the provisions of this section shall be exclusively in the proper orphans' court: *Provided, however*, That nothing herein contained shall be construed to affect the jurisdiction of any court of common pleas in proceedings pending at the date of the approval of this act.

NOTE.—This clause is introduced to take away the concurrent jurisdiction of the common pleas to appoint substituted testamentary trustees. This

involves the repeal of Sections 1 and 2 of the Act of April 14, 1828, P. L. 453, 4 Purd. 4894, Sections 18, and 23 to 26 of the Act of June 14, 1836, P. L. 634, 4 Purd. 4895-4900, and Section 5 of the Act of May 3, 1855, P. L. 416, 4 Purd. 4900, so far only as they relate to testamentary trustees. Sections 1 and 2 of the Act of March 22, 1825, P. L. 107, 4 Purd. 4894, conferring jurisdiction upon the supreme court, though doubtless obsolete since the Constitution of 1874, still appear in the Digests, and should be repealed by the present act so far as they relate to testamentary trustees.

See Lewis' Est., 30 Dist. 391.

588. NON-RESIDENT FIDUCIARIES; CORPORATIONS OF OTHER STATES AS FIDUCIARIES POWERS; APPOINTMENT OF NON-RESIDENTS AND FOREIGN CORPORATIONS AS FIDUCIARIES.

SECTION 57. (a) Any fiduciary appointed by any orphans' court of this commonwealth, or by virtue of any last will and testament, probated within this commonwealth, may, if resident within this commonwealth, lawfully execute the duties of his trust, whether or not he is a resident of the county in which the trust was created, or in which the decedent had his domicile. The court having jurisdiction may, in its discretion, appoint or refuse to appoint as trustee or guardian any person who is not a resident of this commonwealth, or a corporation of any state of the United States of America, other than Pennsylvania, duly authorized by its charter or by law to act as such fiduciary, and shall require in all cases of a non-resident of this commonwealth, or of such corporation, a bond, with sufficient sureties, conditioned for the faithful discharge of the duties of the trust; but the court may, in its discretion, permit such corporation to give its own bond without sureties. Every appointment by will of a trustee or guardian who is a non-resident of this commonwealth shall be subject to the approval of such court and the court may require the entry of such bond. No such appointment shall be made of, nor shall letters testamentary be issued to, a corporation of another state, unless such corporation shall first file with the clerk of said court or with the register of wills, as the case may be, an appointment in writing of an attorney-in-fact, resident within the respective county, upon whom service of process and notices may be made.

NOTE.—This is Section 1 of the Act of May 17, 1871, P. L. 269, 4 Purd. 4923, confined to fiduciaries who are within the scope of the new act, altered in phraseology and extended to testamentary guardians and to

corporations of other states. The clause as now worded is believed to express the meaning of the ambiguous language of the Act of 1871. See *Plummer's Estate*, 24 Dist. Rep. 542. The last sentence is new.

589. APPOINTMENT OF RESIDENT CO-TRUSTEES.

(b) When the trustee or trustees of any estate shall reside out of this commonwealth, and any part of the trust estate, property or fund is situated within this state, the proper orphans' court may, on the petition of any of the parties interested in said trust property, appoint one or more trustees resident within this commonwealth, to act in conjunction with said non-resident trustee or trustees in the management and disposition of said trust; and the said court shall have the same power over said trustee or trustees so appointed that it has in other cases of trust.

NOTE.—This is Section 2 of the Act of March 17, 1838, P. L. 81, 4 Purd. 4900, with slight changes of phraseology. That section is recommended for repeal so far as it relates to trustees concerned with decedent's estates.

590. FOREIGN FIDUCIARIES,—EXECUTORS, ADMINISTRATORS AND TRUSTEE.

SECTION 58. (a) Except as hereinafter provided, no letters testamentary or of administration, or otherwise, which may be granted out of this commonwealth, purporting to authorize any person to intermeddle with the estate of a decedent, shall confer upon such person any of the powers and authorities possessed by an executor or administrator under letters granted within this state; nor, except as hereinafter provided, shall any appointment of a trustee of a decedent's estate or any part thereof by will probated out of this commonwealth, or by any court out of this commonwealth, confer upon such person any of the powers and authorities possessed by a trustee under a will probated within this state or appointed by an orphans' court of this state.

NOTE.—This is founded on part of Section 6 of the Act of March 15, 1832, 1 Purd. 1074. The provision was new in that act, the Commissioners remarking: "The practice of recognizing foreign letters of administration is believed to be almost peculiar to this state. It originated in the Act of 1705. We propose an alteration of the law in this respect. In the case of *M'Cullough v. Young* (1 Binney 63; and see 1 Dall. 457), the court admit that much inconvenience may arise from this provision of our law, and suggest that it may be a fit subject for legislative interposition. We have introduced the last of these provisions in consequence of this suggestion and with entire conviction of its propriety."

The changes now made are to insert the words "except as hereinafter provided," so as to except the cases covered by the subsequent clauses of this section, to transpose the clause beginning "which may be granted," so that it stands after "otherwise" instead of after "decedent," and to add the provision as to trustees.

A trustee appointed in another state to execute a trust created by the will of a decedent, domiciled in that state, there being no power or direction to sell contained in the will, will not be authorized by an orphans' court of Pennsylvania to sell real estate situated in this state.

"Clause (b) contains a similar provision as to foreign guardians derived from the Act of March 29, 1832, Section 7, P. L. 190, clause (c) condensed and revised the statutory rights of foreign fiduciaries as to personal estate; clauses (f and g) further enlarged their powers in certain cases, while clause (d) substantially reenacted the Act of June 23, 1897, P. L. 200, 1 Purd. 1103, applying to cases where the will conferred a power of sale, and, in view of *Hoysradt v. Gas Co.*, making it expressly applicable to the case of a successor trustee. Except, however, as these subsequent clauses of Section 58 expressly conferred powers upon foreign fiduciaries, the prohibition in clause (a) is explicit; it enacts in terms that no appointment of a trustee by will probated out of the Commonwealth or by any court out of this Commonwealth shall confer upon such person any of the powers and authorities possessed by a trustee under a will probated within this State or appointed by an orphans' court in this State." *GEST, J.*, in *Jones' Est.*, 47 Pa. C. C. 463; 28 Dist. 282.

591. FOREIGN GUARDIANS.

(b) Except as hereinafter provided, no appointment of a guardian, made or granted by any authority out of this state, shall authorize the person so appointed to interfere with the estate, or control the person of a minor in this state: *Provided*, That such foreign guardian may, at the discretion of the orphans' court having jurisdiction, be appointed by said court, on giving security for the due performance of his trust.

NOTE.—This is Section 7 of the Act of March 29, 1832, 1 Purd. 1085, which was new in that act, changed by inserting the first four words and by modifying the wording of the proviso.

See *Jones' Est.*, 47 Pa. C. C. 436; 28 Dist. 282.

592. POWERS OF FOREIGN FIDUCIARIES IN GENERAL; AUTHENTICATION OF COPIES OF WILLS, OR OTHER AUTHORITY.

(c) It shall be lawful for any executor, administrator, trustee, or other person duly authorized to take charge or possession of

the personal estate of any decedent, or for any guardian or other legal representative of the estate of a minor, acting under letters testamentary or of administration, or other authority, granted by or under the laws of any other state, territory or possession of the United States of America, or of any foreign country, to assign and transfer, and to receive the dividends or interest of, any public debt or loan of the Commonwealth of Pennsylvania, or of any county, city, borough, township or school district thereof, or any stocks or bonds of any corporation incorporated under the laws of this commonwealth, standing in the name of, or belonging to, the decedent, minor or cestui que trust, or any mortgage debt or indenture of mortgage held by, or belonging to, the decedent, minor or cestui que trust, upon real estate situate within this commonwealth, and to enter or cause to be entered satisfaction upon the record of such indenture of mortgage. Before any such act shall be done by any such executor, administrator, trustee, guardian or other person, there shall be filed in the office of the register of wills for the county in which is located the office for the transfer of such loans, stocks or bonds, or, in the case of a mortgage, of the county where the mortgaged real estate may be situated, when such person is acting under letters or other authority granted by or under the laws of any other state, territory or possession of the United States of America, a copy of the will, probate and letters issued thereon, or of such other grant of authority, duly authenticated in accordance with the Acts of Congress; or, when such person is acting under letters or other authority granted by or under the laws of any foreign country, a copy of such will, probate and letters issued thereon, or of such other grant of authority, certified by the official custodian of such documents or records, under his official seal if any, to be a true and correct copy of the originals thereof in his possession or under his control, together with the certificate of the presiding judge or the officer having jurisdiction or authority over such custodian that the attestation is in due form and by the proper officer: *Provided*, That before any such executor, administrator or trustee shall assign or transfer any such loans, stocks, bonds or mortgages, or receive any interest or dividends thereon, or enter satisfaction of any such mortgage, he shall also file, with said register of wills, an affidavit stating that the said decedent is not indebted to any person in this commonwealth, and that the

proposed transfer, assignment, receipt or entry of satisfaction is not made for the purpose of removing any of the assets of said decedent beyond the reach of any of the creditors in this commonwealth; and any such transfer, assignment, receipt or entry of satisfaction without first making and filing such affidavit, shall be void.

NOTE.—This is Section 1 of the Act of April 8, 1872, P. L. 44, 1 Purd. 1103, as amended by the Act of June 13, 1911, P. L. 890, 5 Purd. 5890, further amended so as to include the provisions of Section 3 of the Act of April 14, 1835, P. L. 275, 1 Purd. 1101; Section 5 of the Act of March 12, 1842, P. L. 67, 1 Purd. 1101; Section 3 of the Act of June 16, 1836, P. L. 683, 1 Purd. 1102; Section 8 of the Act of May 15, 1850, P. L. 767, 1 Purd. 1102; and Section 1 of the Act of May 15, 1874, P. L. 195, 1 Purd. 1102.

The sections of the Acts of 1835 and 1842, above referred to, were held to be confined to executors and administrators appointed in one of the United States: *Alfonso's Executors' Appeal*, 70 Pa. 347. The Acts of 1872 and 1874 included foreign countries, but covered only the transfer of loans of the state and the city of Philadelphia, and stock and registered loans of Pennsylvania corporations, and not other municipal loans.

Some changes in phraseology have also been made in the Act of 1872 for the purposes of clearness and brevity.

See forms 48, 49, 53.

See *Jones' Est.*, 47 Pa. C. C. 436; 28 Dist. 282.

593. POWERS OF FOREIGN EXECUTORS AND TRUSTEES AS TO SALE OF REAL ESTATE.

(d) Whenever a citizen of the United States, non-resident in the Commonwealth of Pennsylvania, shall have died owning real estate in this commonwealth, and by his last will and testament shall have empowered his executor or trustee to sell and convey his real estate, it shall be lawful for said executor or trustee, or his duly appointed successor, although not a resident in this commonwealth, from and after the expiration of one year from the death of such decedent, to execute any power of sale contained in said last will and testament, and to sell and convey to the purchaser the whole or any part of such real estate located in this commonwealth: *Provided*, That before executing the power of sale, a copy of the last will, probate and letters testamentary, and of the decree appointing such successor, if any there be, duly authenticated as provided in clause (c) of this section, shall be filed in the office of the register of wills of the county where the land is situated: *Provided further*, That noth-

ing in this clause shall change or modify the acts of assembly relating to collateral inheritances.

NOTE.—This is Section 1 of the Act of June 23, 1897, P. L. 200, 1 Purd. 1103, except that the period is reduced from five years to one year to correspond to the reduction of the period of lien of decedents' debts; in the first proviso, "duly authenticated copy" is used instead of "certified copy"; in the second proviso "clause" is substituted for "act"; and the provisions as to the "duly appointed successor" have been inserted: See *Hoysradt v. Gas. Co.*, 194 Pa. 251.

The Act of May 20, 1891, P. L. 98, Section 1, 1 Purd. 1103, provided that conveyances theretofore made under the authority of wills proved as prescribed by the laws of the state of which the testator was a citizen should, upon the recording of a duly certified copy of the will in the office of the register of the county where the lands lay, have the same force and effect as if the will had been duly proved in Pennsylvania. The Act of 1891 was substantially the same as the Acts of May 28, 1885, P. L. 24, Section 1, and May 22, 1878, P. L. 98, Section 1. The validating Act of April 2, 1915, P. L. 43, 6 Purd. 7288, is in similar terms. These validating acts are not suggested for repeal.

See *Jones' Est.*, 47 Pa. C. C. 463; 28 Dist. 282.

594. REVIVAL OF JUDGMENTS BY FOREIGN EXECUTORS AND ADMINISTRATORS.

(e) It shall be lawful for foreign executors or administrators to cause to be issued, in their names as such executors or administrators, writs of scire facias within this commonwealth, on all judgments in favor of their decedents, the lien of which judgments is about expiring: *Provided*, That before any further proceedings are had, letters testamentary or of administration must be granted within this commonwealth, as provided by law.

NOTE.—This is Section 1 of the Act of June 27, 1883, P. L. 163, 1 Purd. 1101, with slight verbal changes.

595. AWARDS TO FOREIGN EXECUTORS AND ADMINISTRATORS.

(f) It shall be lawful for the orphans' court having jurisdiction of the accounts of any fiduciary to award personal property to the foreign executor or administrator of a deceased non-resident creditor, legatee or distributee, when it shall appear to the satisfaction of the court, by affidavit or other evidence, that there are no creditors of such non-resident decedent within this commonwealth, and when it shall further appear by certificate of the register of wills, surrogate or court of the proper jurisdiction, duly authenticated as required by the Acts of Congress, if the

domicile of such non-resident creditor, legatee or distributee was in another state, territory or possession of the United States of America, or by the proper diplomatic or consular officer appointed by the United States of America, under his official seal, if such domicile was in a foreign country, that the person claiming to receive such award is authorized under the laws of such state, territory, possession or country to receive the property of his decedent: *Provided*, That the benefits of this clause shall not extend to any case in which it shall appear that the rights of any resident of this commonwealth may be adversely affected by such transfer of property to such foreign executor or administrator.

NOTE.—This is a new clause, copied, with a few changes in language, and with the insertion of the words “to the satisfaction of the court,” and “or other evidence,” in lines 5 and 6, from House Bill No. 248 of the session of 1915, which, the Commissioners are advised, was vetoed.

The Commissioners are of opinion that this clause will eliminate a hardship that frequently arises in the settlement of estates where a distributee domiciled in another state or foreign country is entitled to an award. As the law now stands, the foreign executor or administrator cannot be recognized by the court in awarding distribution; and the appointment of an ancillary executor or administrator is required to be made, although the distributee may never have resided or done business in this commonwealth, and there is not the slightest probability of the existence of any debts due to our citizens. This involves delay and expense, the entry of security in the office of the register of wills, with the further costs of filing and adjudication of an account before the bond can be released. The Commissioners believe that the rights of residents of our own commonwealth are sufficiently safeguarded in this clause, and therefore, in spite of the veto above mentioned, respectfully recommend its adoption.

See Jones' Est., 47 Pa. C. C. 463, 28 Dist. 282; Moss' Est., 29 Dist. 235.

In the distribution of assets of foreign intestates, the orphans' court of Allegheny County will require that the domicile of the decedent be conclusively established before a decree will be made. If the distributees are domiciled abroad, their rights to share in the estate must be clear as well as how said shares are to be disbursed either by consular agencies or otherwise. Foreign Intestates, 68 P. L. J. 1.

596. POWERS OF FOREIGN GUARDIANS, TRUSTEES, COMMITTEES AND OTHER FIDUCIARIES, AS TO REMOVAL OF PROPERTY,—PROOF OF APPOINTMENT AND QUALIFICATION OF FIDUCIARY.

(g) 1. In all cases where any guardian and his ward, or trustee and his cestui que trust, or committee and his lunatic, or any other

fiduciary and the person in whose interest he is acting, shall both be non-residents of this state, and such ward or cestui que trust shall be entitled to money, personal property of any description or the proceeds of any sale of real estate in this state, under the control or jurisdiction of any orphans' court, and such guardian, trustee or other fiduciary shall produce satisfactory proof to said court, by certificates, that he has given bond and security, with special reference to the money or personal property to be removed, in the state or country in which he and his ward or cestui que trust reside, in double the amount of such money or of the value of such property, as guardian, trustee or other fiduciary, and it shall be found that a removal of the property will not conflict with the terms or limitations attending the right by which the ward or cestui que trust owns the same, and that no right of any resident of this commonwealth will be prejudiced by such removal, then any such guardian, trustee or other fiduciary may demand or sue for and remove any such money or property to the place of residence of himself and his ward or cestui que trust. If such guardian, trustee or other fiduciary and his ward or cestui que trust reside in another state, territory or possession of the United States of America, such certificate shall be authenticated as required by the Acts of Congress, and, if they reside in a foreign country, shall be made by the court having jurisdiction of such guardian, trustee or other fiduciary, and authenticated by and under the official seal of a diplomatic or consular officer appointed by the United States of America and residing in such country: *Provided*, That if it shall appear by such certificate that, under the laws of such state, territory, possession or foreign country, such guardian, trustee or other fiduciary, is not required to enter security, but that the interests of his ward or cestui que trust are safeguarded by a deposit of the money or property in the court having proper jurisdiction, then it shall be lawful for the orphans' court of the proper county in this state to cause suitable orders to be made authorizing the delivering and passing over of such money or property to such court without the entry of security.

NOTE.—This is Section 1 of the Act of May 13, 1889, P. L. 190, 1 Purd. 1085, which amended Section 1 of the Act of April 21, 1856, P. L. 495, now further amended by adding the proviso, which seems to belong in this section rather than in the next one, by including committees of lunatics and other fiduciaries, and by making other changes as in House Bill No.

247 of the session of 1915, which bill the commissioners are advised was vetoed.

Those changes were to extend the act to residents of foreign countries, thus supplying an hiatus in the law, and to provide that the bond must have been given "with special reference to the property to be removed."

In the present draft, the condition has also been added that "no rights of any resident of this commonwealth will be prejudiced by such removal."

The Act of 1889, as amended, seems to cover all matters included in Section 2 of the Act of April 13, 1840, P. L. 319, 1 Purd. 1088, and Section 1 of the Act of May 25, 1871, P. L. 279, 1 Purd. 1086, which are therefore recommended for repeal.

See Jones' Est., 47 Pa. C. C. 463, 28 Dist. 282; Foreign Intestate, 68 P. L. J. 1.

597. DISCHARGE OF RESIDENT FIDUCIARY.

2. When such non-resident guardian or trustee shall produce an exemplification under the seal of the office, if there be a seal, of the proper court in the state or country of his residence, containing all the entries on record in relation to his appointment and giving bond, and authenticated as required by the Acts of Congress, or by a diplomatic or consular officer appointed by the United States of America, as provided in paragraph 1 of this clause, the orphans' court of the proper county in this state may cause suitable orders to be made, discharging any resident fiduciary and authorizing the delivering and passing over of such personal property, and also requiring receipts to be passed and filed, if deemed advisable: *Provided*, That in all cases thirty days' notice shall be given to the resident fiduciary, if such there be, of the intended application for the order of removal; and the court may reject the application and refuse such order whenever it is satisfied that it is for the interest of the ward or cestui que trust that such removal shall not take place, or that the claims of residents of this commonwealth are not fully protected.

NOTE.—This is Section 2 of the Act of May 13, 1889, P. L. 190, 1 Purd. 1085, which amended Section 2 of the Act of April 21, 1856, P. L. 495, further amended substantially as in House Bill No. 247 of the session of 1915, except that the first proviso, added by said bill, has been transferred to the preceding paragraph, the word "filed" has been substituted for "recorded" as to receipts, and the proviso that the benefits of the act shall not extend to the citizens of a state or country in which a similar law does not exist has been omitted.

The changes made by said bill were to include residents of foreign countries, and to insert in the proviso the words "if such there be." In

the next to the last line, "residents of" has been substituted for "creditors in."

The Commissioners are advised that House Bill No. 247 was not approved by the Governor. Notwithstanding such veto, however, the Commissioners, with due deference, beg leave to recommend the passage of this and the last preceding clause.

See Foreign Intestates, 68 P. L. J. 1; Jones' Est., 47 Pa. C. C. 463, 28 Dist. 282.

598. AWARD TO FOREIGN TRUSTEE, WHEN ALL BENEFICIARIES FOR A TERM OF YEARS OR FOR LIFE HAVE REMOVED FROM THE STATE.

(h) When all the persons for whose benefit a valid trust shall have been created by will, for a term of years or for life, shall have removed from this state into any other state, territory or possession of the United States, to reside permanently therein, the orphans' court having jurisdiction of such trust is hereby authorized and empowered, on application by or on behalf of all the persons interested in the trust, to direct the trustee or trustees appointed in and by said will, to pay over said trust moneys, or transfer the securities in which they may have been invested, to a trustee or trustees duly appointed by the court of such other state, territory or possession, upon the production to said court of satisfactory proof, by certificates, of the appointment of such trustee or trustees in the other state, territory or possession, the authority of such trustee or trustees to receive such moneys or securities, and the entry of bond and security or proof of the fact that under the laws of such state, territory or possession security is not required, such certificates to be authenticated in the manner provided in clause (g), paragraph 1 of this section, and upon the production of satisfactory proof that the removal of the property will not conflict with the terms or limitations attending the rights which the cestuis que trust have in such money or securities.

NOTE.—This is founded on Section 1 of the Act of May 8, 1889, P. L. 123, 4 Purd. 4886, which includes trusts created by deed as well as by will, and should be repealed only so far as it relates to the latter.

In the sixth line, "jurisdiction" has been substituted for "cognizance," and in the fourth line and subsequently the words "or possession" have been added after "territory." Instead of the proviso in the Act of May 8, 1889, provisions have been inserted, beginning on the thirteenth line, conforming to those of the preceding sections founded on the Act of May 13, 1889, P. L. 190.

Section 1 of the Act of March 31, 1905, P. L. 91, 5 Purd. 5890, provides: "Executors and administrators, in this commonwealth, shall not be required to deliver to any foreign executor or administrator any fund which has been devised or bequeathed, in whole or in part, by the will of the decedent, valid under the laws of this commonwealth and duly probated at the domicile of such decedent, where any person claiming such fund, or any part thereof, is or shall be a citizen of this commonwealth; but such fund shall be distributed, under the direction of the orphans' court of the proper county, to legatees, devisees and creditors, according to the terms of said will and the laws of this commonwealth." Section 2 is merely a repealer.

The purpose of this act is not clear. If it means that the court in this state shall distribute to resident legatees and creditors, it seems unnecessary. If it means that, because there is one legatee or creditor residing in Pennsylvania, the court here shall distribute the entire estate, it is certainly undesirable. For a discussion of the Act of 1905, see Bertin's Estate, 245 Pa. 256.

It is recommended that the Act of 1905 be repealed.

See Foreign Intestates, 68 P. L. J. 1.

A petition by a non-resident cestui que trust, praying for an order directing the resident trustee to transfer the trust estate to a trustee in another state, under the Fiduciaries Act of June 7, 1917, Section 58 (h) P. L. 447, will be refused when all parties interested in the trust have not joined in the petition.

The Fiduciaries Act does not apply to a case where the parties interested resided outside of this State at the time the testatrix died, but only to a case where they have removed from this State after her death.

The act does not direct the court to authorize the transfer of the estate, but authorizes it to direct the transfer when satisfied that such action will not conflict with the terms of the trust. "This clause of the Fiduciaries Act is copied substantially from the prior Act of May 8, 1889, Section 1, P. L. 123, 4 Purd. 4886, and we think its purpose is very clear. It merely authorizes and empowers this court, on the petition of all persons interested in the trust, when all such persons shall have removed from this state to another state or territory, to direct the transfer of the trust estate; but all persons have not joined and cannot join in the present application, because there may be others having possible or contingent interests in futuro, and their interest should not be disregarded. The argument in behalf of the petitioner goes to the extent, as logically it must, that a life tenant who has removed to another state has a legal right to require this court to direct such a transfer of the trust estate from our jurisdiction, and it is not difficult to imagine the disastrous results of such an interpretation of the act."

"It should be observed, moreover, that even if all the parties interested had joined in the petition, this would not be such a case as was contemplated by the act. When the testatrix died in 1893, her grandson, the life tenant, had been for some years a resident of Massachusetts, as his petition states that he has lived there for thirty-six years, whereas the

act in plain language provides for a case where the parties interested shall have removed from this state, contemplating, of course, a removal that has occurred after the trust has gone into effect. But in this case, when the testatrix made her will in the same year in which she died, she selected two residents of her home city as trustees, and on the death of the survivor, which event has occurred, appointed the present trustee, also resident here. She deliberately intended that, although her beneficiary was a non-resident, her trust estate should be administered here by trustees in whom she reposed confidence, and the estate has been so administered for the past twenty-eight years.

The act does not direct the court to authorize the transfer, but conversely authorizes the court to direct the transfer, upon the production of satisfactory proof that the removal of the property will not conflict with the terms or limitations attending the rights which the *cestuis que trust* have in the money or securities. This court certainly has some discretion in the matter, and as we are of opinion that the present case is not such as was intended by the legislature, the petition is accordingly dismissed." *GEST, J.*, in *Dixon's Est.*, 30 Dist. 463.

599. GUARDIANS,—POWER OF ORPHANS' COURT TO APPOINT; EFFECT OF APPOINTMENT.

SECTION 59. (a) The orphans' court of each county shall have the care of the persons of minors resident within said county, and of their estates, and shall have power to admit such minors, over the age of fourteen, when and as often as there shall be occasion, to make choice of guardians, and to appoint guardians for such as are under the age of fourteen or otherwise incompetent to make choice for themselves. Such appointment or admission of a guardian by the orphans' court of the county in which the minor resides, shall have the like effect in every other county in this commonwealth, as in that by the orphans' court of which he shall have been so admitted or appointed.

NOTE.—This is Section 5 of the Act of March 29, 1832, 1 Purd. 1083, altered by inserting in the fourth line the words "over the age of fourteen," by substituting in lines 6 and 7, the words "are under the age of fourteen" for "they shall judge too young," and by omitting the first part of the proviso, which is covered by clause (b).

Section 5 of the Act of 1832 was derived from Sections 7 and 12 of the Act of March 27, 1713, 1 Sm. L. 81. The Act of 1832 confined the jurisdiction to minors resident within the county, and omitted that part of Section 7 of the Act of 1713 which empowered the court "to order and direct the binding or putting out of minors apprentices to trades, husbandry or other employment."

The parents of the minor lived in Philadelphia, where the father died in 1909. The mother continued to reside in Philadelphia until she remarried in 1913, since which time she has lived with her second husband in Montgomery County. The minor was taken by the mother to their new home, where she now resides with her mother and stepfather. On a petition to the Orphans' Court of Philadelphia County to appoint a guardian of the minor's estate: *Held*, the jurisdiction belonged to the Orphans' Court of Montgomery County, and the petition was dismissed.

The Act of March 29, 1832, par. 5, P. L. 190, reenacted in Section 59 of the Fiduciaries Act of June 7, 1917, P. L. 447, vests the jurisdiction to appoint a guardian of a minor's estate in the orphans' court of the county wherein the minor is resident. "We are of opinion that the jurisdiction to appoint a guardian of this minor's estate belongs to the Orphans' Court of Montgomery County and not to us.

"The question is a narrow one, and we have not been able to find any decision absolutely controlling. The Act of March 29, 1832, Section 5, Purd. 1083, reenacted in Section 59 (a) of the Fiduciaries Act of June 7, 1917, P. L. 447, vests the jurisdiction in the orphans' court of the county wherein the minor is resident. Judge ASHMAN, in *Mintzer's Est.*, 2 Dist. R. 584, expressed the opinion that the word resident was probably used advisedly, instead of domiciled, and the supreme court, in *Taney's Appeal*, 97 Pa. 74, and *Wilkin's Est.*, 146 Pa. 585, appear to take the same view. Other courts may have expressed a different opinion, and we need not insist upon the distinction in this case, but if such distinction exists, it would afford further ground for our decision."

"We have examined numerous cases upon the general subject, and find none that appear to rule the present. In our opinion, there is no reason why the mother, being the natural guardian and next friend of her child, should not be able, on her remarriage, to remove into another county of the state without separation of her legal residence from that of her child, and, from the standpoint of convenience, it is certainly preferable that the guardian of her child's estate should be appointed by, and be subject to the control of, the court of the county where they both live, rather than by that of another county that may be hundreds of miles away." *GEST, J.*, in *Jacoby's Est.*, 47 Pa. C. C. 183, 28 Dist. 7.

Testatrix bequeathed to her granddaughter the sum of \$25,000 to be paid to her with accumulated interest on reaching the age of eighteen years. On reaching that age, the minor petitioned for payment of the legacy, which, with interest, then amounted to the sum of \$44,911. *Held*, that the duty of the court to safeguard the property of minors under the Fiduciaries Act of June 7, 1917, Sec. 59, P. L. 447, required that the petition be refused.

Semble: The direction in the will cannot confer upon the minor legatee a capacity greater than that conferred by the law.

"By statute, this court is entrusted with the care of the persons of minors here resident and of their estates: Act of March 29, 1832, Section 5, P. L. 190, 1 Purd. 1083; Fiduciaries Act of June 7, 1917, Section 59, P. L. 447. We think we should, therefore, be derelict in our duty if we

permitted so large a sum to be paid over to a young woman of eighteen years. An allowance of a dollar a week for spending money is not comparable with \$45,000 paid in a lump. Minors should be protected against themselves until they reach the age when the Legislature says that they are old enough to stand on their own feet and take their chances.

"Notwithstanding what was said in *Grauch's Estate*, 13 Dist. R. 329, that the testator could make his own law, we are of opinion that our duty to safeguard the property of minors requires us to refuse the prayer of the petition." *Gest, J.*, in *Crampton's Est.*, 46 Pa. C. C. 273, 26 Dist. 1060, 35 Lanc. 246.

As the control of the interest of minors in the money compensation under the Workmen's Compensation Act of June 2, 1915, P. L. 736, rests within the general jurisdiction of the orphans' court, and this has not been changed by the Fiduciaries Act of June 7, 1917, P. L. 447, the Workmen's Compensation Board is without power to commute the interest of minors without guardians, and to authorize investment of the amounts commuted in real estate without the approval of the orphans' court.

Dolan v. Pittsburgh Coal Co., 27 Dist. 877, 66 P. L. J. 241.

600. PERSONS OF SAME RELIGIOUS PERSUASION AS PARENTS TO BE PREFERRED AS GUARD- IANS OF THE PERSON.

(b) Persons of the same religious persuasion as the parents of the minors shall, in all cases, be preferred by the court, in their appointment as guardians of the persons of such minors.

NOTE.—This is founded on the first part of the proviso to Section 5 of the Act of March 29, 1832, 1 Purd. 1083.

The Fiduciaries Act of 1917 reenacts the provisions of the Act of March 29, 1832, and makes it the imperative duty of the court to appoint a guardian of the person of a minor of the same religious faith as that of the parents, if it can be done without materially affecting their temporal welfare.

"It is very evident, from the facts in this case, that it was the expressed intention of both parents of these minors that they should be brought up in the Catholic faith, the mother emphasizing this desire by appointing a testamentary guardian for the children who was of that faith. We feel that we should not ignore one of the last thoughts and wishes of the mother, concerning the care, religion and training of her children; and that under the Acts of Assembly compelling us to properly regard the faith of the parents in appointing a guardian and authorizing us to remove a guardian only for mismanagement and misconduct, we cannot in view of the facts in this case, remove the guardian." *SCHAEFFER, P. J.*, in *Spencer's Est.*, 10 Berks 171.

Both parents of three minor children died, the mother being a member of the Roman Catholic Church, and the father a member of the Protestant Episcopal Church. The sister of the father was appointed guardian of

the estates of the minor children in the lifetime of the father. Subsequent to his death two petitions were presented to the court for the appointment of the paternal grandfather and the maternal uncle respectively, as guardian of the persons of said minors. The petition for the appointment of the maternal uncle claimed that under Section 59 (b) of the Fiduciaries Act of 1917, the court was obliged to appoint a guardian of the persons, of the same religious persuasion as that of the mother, the facts being that before marriage, the father orally agreed that the children should be brought up in the Roman Catholic faith, and consented to their being baptized in that church.

The court held that under the Fiduciaries Act, only when both parents were of the same religious persuasion was it mandatory upon it to appoint a person of the same faith. In this case as both parents were of different faiths, it was for the court to do that which will be for the best interest of the minors, and as the petitioner for the appointment of the maternal uncle states that the paternal grandfather is in every way qualified to bring the children up properly, and he further having consented to their being brought up in the Roman Catholic faith, there would be no reason why he should not be appointed, he being the nearest next of kin, and the minors' father in his lifetime having entrusted the care of two of the minors to him, therefore the paternal grandfather was appointed guardian. Butcher's Est., 35 Montg. 162; affirmed in 266 Pa. 479, 109 Atl. 683.

601. EXECUTOR, ADMINISTRATOR OR TRUSTEE NOT TO BE APPOINTED GUARDIAN.

(c) No executor, administrator or trustee shall be admitted or appointed, by the orphans' court, guardian of a minor having an interest in the estate under the care of such fiduciary: *Provided*, That nothing herein contained shall be construed to extend to the case of a testamentary guardian.

NOTE.—This is Section 6 of the Act of March 29, 1832, 1 Purd. 1084, which was new in that act. The only change is to add "or trustee."

602. PARENT NOT TO BE APPOINTED GUARDIAN; WHERE ESTATE IS \$100 OR LESS, AWARD MAY BE MADE TO NATURAL GUARDIAN OR PERSON MAINTAINING MINOR.

(d) The orphans' court shall not appoint the father or the mother of a minor as guardian of the estate of said minor: *Provided*, That nothing herein contained shall be construed to extend to the case of a testamentary guardian: *And provided further*, That where the estate of the minor shall be of the value of one hundred dollars or less, the court may, in its discretion,

authorize payment or delivery thereof to the natural guardian of the minor or the person by whom the minor is maintained, without the appointment of a guardian by the court or the entry of security.

NOTE.—This is a new section, framed in part in accordance with the existing practice in many counties. The Commissioners regard it as always inadvisable and frequently dangerous to appoint the parent of a minor to be the guardian of its estate. Parents are too often tempted to regard the estate as virtually their own and use it for purposes which could not be approved by the court; or even when actuated by proper motives will not keep the accurate accounts of the estate which the minor on coming of age is entitled to receive. The consequence may be either an unfortunate and distressing litigation, or perhaps the condonation of an injustice.

When the amount is very small, it seems unnecessary to subject the fund to the expense of a guardianship.

Under the Fiduciaries Act, the orphans' court is vested with a discretion in minors' estates of \$100 or less, so that it may decree the payment of the same to their natural guardians without security.

"The foregoing is a new provision and vests the court with a discretion in minors' estates of this amount. In view of the fact that the mother in this case, who is the natural guardian, is keeping her children together and is maintaining them and seems to be an entirely fit person, it is a proper exercise of the discretion conferred to direct the legacies to be paid to her, the same to be expended by her for the benefit of the minors as in her judgment may seem to their best interests." MILLER, J., in *Dailey's Est.*, 27 Dist. 464; 65 P. L. J. 796; 31 York 132.

While Section 59, clause (d), of the Fiduciaries Act of June 7, 1917, P. L. 447, forbids the appointment of a father as legal guardian of his child, it permits the court to decree that a legacy of \$100 or less bequeathed to a minor may be paid to his father as natural guardian.

Parents who have received such legacies cannot spend them at will and in the exercise of their own judgment, but are as much legally responsible for their conservation and accretions, and accountable to the *cestui que trustent*, as a legally appointed guardian under bond.

"The section of the act under which this application is made is new and evidences a radical departure from the pre-existing law and practice relative to the administration of the estates of minors. Other than the exercise of the discretion therein granted to the court, the act is silent as to the actual duties, responsibilities and liability of the trustee without security, so designated in the administration of the trust thus created and authorizes a decree for the payment of moneys belonging to minors to persons whom the opening words of Section 59 of the act prohibits the appointment of as legal guardian by the orphans' court. This prohibition is but legislative confirmation of the uniform opinions of the Pennsylvania judiciary as to the impropriety of such appointments and heretofore adopted as a rule of practice for the best of reasons, so well understood

as to render it unnecessary to here repeat or cite authorities. We are fain to believe that evils thus guarded against will in some cases follow the practice authorized by the Act of 1917, and that it would have been wiser legislation to have designated some responsible trust company or bank institution as custodian of such funds, thereby effecting the evident commendable purpose of the act, viz., to save expense and simplify administration, while at the same time avoiding the risks attaching to a trust reposed in those bearing parental relation to the *cestuis que trustent*.

"The case of Daley's Estate (should be Bailey's Estate, *supra*), 27 Dist. R. 464, in the Orphans' Court of Allegheny County, appears to be the only reported similar application under the act, and the closing language of the opinion and order of MILLER, J., granting the prayer of the petition, leads us to the expression of a different conclusion as to the status of the parent receiving the fund than his language would imply.

"This being the first application in this jurisdiction, we are led to state some of our views for the guidance of the trustees created by this order, until in some adverse proceeding we may, on full discussion be convinced otherwise.

"The parent and 'natural guardian,' upon receiving the legacies in question, holds the same relation thereto as attaches to such relative receiving similar funds in the absence of such an order.

"Quoting from Evans' Estate, 1 Dist. R. 453, 11 Pa. C. C. Reps. 324: 'He (the father) was his natural guardian; guardian by nature, so that if an estate be left to an infant, as to him, the father is by common law the guardian and must account to his child for the profits thereof: Co. Litt., 88.'

"In the last case quoted from, a citation prayed for against such common law guardian was refused by the orphans' court, holding that the remedy was by an action at law.

"The question whether the receipt of the legacies under this order, impliedly from the provisions of the statutes of 1917, changes the character of the recipient from that of common law guardian to that of a legal guardian with security, and changes the forum of jurisdiction over such and the account from the common law courts to the orphans' court, we will not now decide. Our only purpose in this discussion is to make clear the point that parents who have received the funds in question from petitioning executors cannot expend them at will and in the exercise of their own judgment, but are as much legally responsible for their conservation and accretions of interest thereto, and accountable for the same to the *cestuis que trustent*, as a legally appointed guardian with bond of the orphans' court.

"Our conclusions are sustained not only by the common law doctrine above referred to, but also by the language and spirit of subdivision (d) of Section 59 of the Act of 1917.

"Although the petition is to be by the executor of the estate from which the legacies are payable, and primarily for his relief and discharge from liability on such payment, manifestly the interest of the legatees and their property are also intended to be conserved, and we cannot conceive that the recipient shall have unlimited and uncontrolled use and expenditure

of the money when such are prohibited of similar sums received by any other trustee.

"We are aware that it is unusual for a court to express an opinion on an abstract proposition, but in view of the ambiguity of the act, not so much from what is expressed therein, but more from what is omitted, we have assumed to state our views as justified by way of proper judiciary suggestion to those becoming custodians of the funds in question." SMITH, P. J., in *Storer's Est.*, 28 Dist. 215.

603. APPOINTMENT OF GUARDIANS OF ESTATES OF MINORS RESIDING OUT OF THE COMMONWEALTH.

(e) The orphans' court of each county shall have power to appoint guardians of the estates of minors residing out of the commonwealth, in all cases where such minors are possessed of estates lying within the jurisdiction of said court, upon the petition of the minors, if over the age of fourteen, and if it be reasonably practicable for such minors to present their own petitions, and in other cases on the petitions of persons qualified to act as their next friends, without requiring the said minors to appear in court to make choice of such guardians.

NOTE.—This is Section 44 of the Act of April 25, 1850, P. L. 576, 1 *Purd.* 1084, altered by substituting the words beginning "if over the age of fourteen" and ending "next friends" for "or any of their relatives or friends or any person interested in such estates."

604. APPOINTMENT OF GUARDIANS FOR MINORS IN SERVICE OF UNITED STATES, OR WHOSE APPEARANCE IS PHYSICALLY IMPOSSIBLE OR UNNECESSARILY EXPENSIVE.

(f) The orphans' court of each county shall have power to appoint guardians of the persons and estates of minors, residents of such county, who may be absent in the service of the United States or who may be physically unable to appear and choose for themselves, or who may be so distant from the seat of justice of the county as to make it unnecessarily expensive for them to appear, upon the petition of the minors, if over the age of fourteen, and if it be reasonably practicable for such minors to present their own petitions, and in other cases on the petitions of persons qualified to act as their next friends, without requiring the said minors to appear in court to make choice of such guardians: *Provided*, That when the appointment shall be made on petition

of a next friend, the minor, if of the age of fourteen or on attaining that age, may subsequently appear and choose his guardian.

NOTE.—This is Section 1 of the Act of August 25, 1864, P. L. 1029, 1 Purd. 1085, altered so as to conform to the provisions of the last preceding clause, and by inserting, in the third line, "residents of such county."

605. BONDS OF GUARDIANS.

(g) The orphans' court having jurisdiction, whenever they may deem it proper, may require a bond, with good and sufficient corporate security, or with two good and sufficient individual sureties, from every guardian of a minor, whether admitted or appointed by the court, or appointed by will, or, in the case of a corporation duly authorized by its charter or by law to act as guardian, said court may permit such corporation to give its own bond without surety. Guardians' bonds shall be filed in the office of the clerk of the court, and be considered in trust for all persons interested; the bonds shall be taken to the commonwealth in such penalties as the court shall direct and the condition shall be in the following form:

The condition of this obligation is such, that if the above-bounden A. B., guardian of C. D., a minor child of E. F., (late of _____, deceased,) shall, at least once in every three years, and at any other time when required by the orphans' court for the county of _____, render a just and true account of the management of the property and estate of the said minor, under his care, and shall also deliver up the said property, agreeably to the order and decree of the said court, or the directions of law, and shall, in all respects, faithfully perform the duties of guardian of the said C. D., then the above obligation shall be void, otherwise it shall be and remain in full force and virtue.

Provided, That nothing in this act contained shall be construed to deprive a minor of any action or remedy to which he may be entitled at the common law, against his guardian for any cause whatever.

NOTE.—This is Section 8 of the Act of March 29, 1832, 1 Purd. 1086, altered by substituting new provisions as to the sureties in place of the old phrase "with good and sufficient security."

Section 8 of the Act of 1832 was founded on Section 1 of the Act of March 30, 1821, P. L. 153.

It is noted in Purdon that in Perry County the bonds are required by the Act of March 27, 1869, P. L. 488, to be recorded, and such record is evidence.

See form 21.

An administrator of a deceased minor has a standing to cite the minor's guardian to file an account where it appears that the latter never had filed an account, and was under an inadequate bond.

Cook's Est., 48 Pa. C. C. 599 (s. c. sub nom. Kerr's Petition), 29 Dist. 909.

606. INVENTORY TO BE FILED BY GUARDIAN.

(*h*) Every guardian shall, within thirty days after any property of his ward shall have come into his hands or possession, or into the hands and possession of any person for him, file in the office of the clerk of the court a just and true inventory and statement, on oath or affirmation, of all such property or estate.

NOTE.—This is Section 9 of the Act of 1832, 1 Purd. 1086, which was new in that act. The word "such" is omitted before "guardian" in the first line.

See form 20.

607. ALLOWANCE FOR SUPPORT AND EDUCATION OF MINOR.

(*i*) When any one shall die, leaving an infant child or children, without having made an adequate provision for the support and education of such child or children, during their minority, the orphans' court may direct a suitable periodical allowance, out of the minor's estate, for the support and education of such minor, according to the circumstances of each case; which order may, from time to time, be varied by the court, according to the age of the minor and the circumstances of the case.

NOTE.—This is Section 13 of the Act of 1832, 1 Purd. 1088, which was new in that act.

See forms 96-100.

608. ACCOUNTS OF GUARDIANS,—TRIENNIAL ACCOUNTS.

(*j*) 1. Every guardian, whether required by the court to give security or not, shall, at least once in every three years, and at any other time when so required by the court, render an account

of the management of the minor's property under his care, which accounts shall be filed in the office of the clerk of the orphans' court, for the information of the court and the inspection of all parties concerned.

An administrator of a deceased minor has a standing to cite the minor's guardian to file an account where it appears that the latter never had filed an account, and was under an inadequate bond.

Cook's Est., 48 Pa. C. C. 599 (s. c. sub nom. Kerr's Petition), 29 Dist. 909.

609. GUARDIAN OR NEXT FRIEND MAY PETITION TO HAVE ACCOUNT AUDITED.

2. After the filing of such account or accounts, such guardian, or any person qualified to act as next friend of the minor, may petition the orphans' court of the respective county for leave to have said account or accounts examined or audited and confirmed, with the same force and effect as executors', administrators' and trustees' accounts are examined or audited and confirmed.

610. CONTENTS OF PETITION.

3. Such petition shall set forth the reason why such account or accounts should be examined or audited and confirmed, and shall contain full information as to who may be next of kin or nearest relative of age to such minor or minors, and all others interested in the minor's estate, together with their addresses if it is possible to give them.

611. NOTICE OF FILING OF ACCOUNT AND PETITION.

4. The court may thereupon direct to whom, and what, notice, if any, shall be given to such next of kin, or nearest relative of age, or the parties interested in said minor's estate, including the minor or minors if fourteen years of age or over, of the filing of said account or accounts and presentation of said petition.

612. AUDIT OF ACCOUNT; APPOINTMENT OF GUARDIAN AD LITEM; CONFIRMATION.

5. After the filing of due proof of the services of said notice, if any be required by the court, the court may, if it be satisfied that any reasonable necessity exists for the examination or audit

and confirmation of such account or accounts, asked by said petition, thereupon appoint some suitable person to act as guardian ad litem for the minor or minors interested in said account or accounts; and the same shall be thoroughly examined by said guardian ad litem, who shall make report to the court of the result of his examination; or the court may examine and audit said account itself; and, after said examination or audit is completed, a final decree of confirmation as to the matters contained in said account or accounts, and said report or reports, and said audit or audits, shall be made by the court, which decree of confirmation shall be final and conclusive as to matters contained in said accounts, reports or audits and decrees, with the same force and effect as such decrees now have in respect to the accounts of executors, administrators and trustees and the audits thereof.

613. PAYMENT OF COSTS.

6. The costs of said audits or examinations, including a fee for said guardian ad litem to be fixed by the court, shall be allowed as part of the administration expenses, and be paid by such guardians out of the property of the ward in their hands and allowed as credits in said decrees or the said costs shall, in the discretion of the court, be paid by the said guardians personally.

614. APPEALS AND REHEARINGS.

7. Appeals from such decrees, and rehearings of such accounts shall be allowed, in the same manner and form, and with the same force and effect, as are allowed in the similar cases of other fiduciaries.

615. FINAL ACCOUNTS.

8. Every such guardian, unless previously discharged or removed, shall, on the arrival of his ward at full age, file in the register's office a full and complete account of his management of the minor's property under his care, including all the matters embraced in each partial account, except where an examination or audit, and final decree of confirmation, has taken place, as hereinbefore provided, in which case said final account shall include only such matter as were not included in such former accounts and decrees aforesaid. And the decree of the orphans'

court upon such final account shall, like other decrees of the court, be conclusive upon all parties, unless reversed, modified or altered on appeal.

NOTE.—This is Section 10 of the Act of 1832, 1 Purd. 1086, as amended by the Act of June 9, 1911, P. L. 744, 5 Purd. 5887, now divided into numbered paragraphs because of its excessive length. The first paragraph was copied from the first clause of Section 3 of the Act of March 30, 1821, P. L. 153. The last was new in the Act of 1832. The others were added by the amendment of 1911.

The only changes now made are to strike out the word "such," before "guardian" in the first line of paragraph 1, so as to make the clause apply to testamentary as well as statutory guardians, to substitute the word "file" for "settle," "partial account" for "partial settlement," "final account" for "final accounts," in the last paragraph; and "rehearings of such accounts" for "rehearings of such decrees," and "similar cases of other fiduciaries," for "cases of decrees made in executors', administrators', and trustees' accounts," in paragraph 7. In paragraph 6, the words beginning "or the said costs," are new.

"The account here required is of the guardian's management of such property of his ward as has come under his case. Where no property of the ward has come into his possession the guardian manifestly can be under no necessity of filing an account. With nothing to account for, there could be no purpose in accounting." SCHAEFFER, P. J., in *Devere's Est.*, 13 Berks 242.

An administrator of a deceased minor has a standing to cite the minor's guardian to file an account where it appears that the latter never had filed an account, and was under an inadequate bond. *Cook's Est.*, 48 Pa. C. C. 599 (s. c. sub nom. *Kerr's Petition*), 29 Dist. 909.

616. NOTICE TO GUARDIAN OF PROCEEDINGS AFFECTING INTERESTS OF MINOR; APPOINTMENT OF GUARDIANS AD LITEM.

(k) In all cases in which proceedings may be had in any orphans' court, affecting the interest of a minor, notice of such proceedings shall be given to the guardian of such minor in the same manner as is provided by law in the case of persons of full age. If such minor has no guardian appointed by an orphans' court of this commonwealth, or by will probated within this commonwealth, the orphans' court in which such proceedings shall be pending shall appoint a guardian ad litem for such minor in the same manner as is provided by this act in the case of ordinary applications for the appointment of guardians. If such minor or his next friend shall fail or refuse to apply for the appointment of a guardian ad litem, as aforesaid, then such

guardian shall be appointed by said court on petition filed by any person interested in such proceedings. Notice shall be served, as aforesaid, upon such guardian ad litem whenever notice shall be requisite.

NOTE.—This is founded on Section 53 of the Act of March 29, 1832, 3 *Purd.* 3372, which was new in that act.

After "minor" in the fourth line, the following words are omitted: "if such guardian be resident within the county, or within forty miles of the seat of justice of the county," and in the fifth line, the word "resident" is omitted before "persons." After "will" in the seventh line, the words "probated within this commonwealth" have been added.

The subsequent part of the section has been remodeled so as to conform to the provisions for appointment of guardians in general, with a method for appointment in case the minor and his next friend fail to act.

See forms 57, 101, 102.

"The orphans' court has no authority to award compensation to a guardian ad litem out of an estate in which his wards have no interest." Per Mr. Justice SCHAEFFER, in *Boyd's Est.*, 270 Pa. 50.

617. TRUSTEES DURANTE ABSENTIA,—PETITION AND APPOINTMENT.

SECTION 60. (a) Whenever it shall be made known to the orphans' court of the county in which shall be found all or the greater portion of the estate, within this commonwealth, of any person who has been a resident either of this commonwealth or of any other state, territory, or possession of the United States, or of any foreign country, and who has absented himself from his usual place of abode, by the petition, verified by affidavit, of the husband, wife or next of kin of such person, or other persons interested, in the order named, such petition being supported by the affidavits of at least two disinterested residents of the city, borough, township, or other territorial subdivision where such person was last known to reside, that such person has been absent from his usual place of abode for the space of one year, that his whereabouts is not and has not been known for the space of one year, and he has left an estate, either real or personal, or both, situated, owing or belonging to him, within this commonwealth without any person to take charge of or manage the same, it shall be lawful for said court to appoint one or more trustees who shall take charge of and manage the estate of such person, so being absent, and who shall be under the control and direction of said court.

NOTE.—This is Section 1 of the Act of April 11, 1879, P. L. 21, 4 Purd. 4904, as amended by the Act of March 30, 1905, P. L. 77, 7 Purd. 7702, altered so as to combine with it the provisions of Sections 2 and 3 of the Act of 1905, so as to provide for the affidavits of two disinterested residents in all cases and to substitute "city" for "ward," and so as to omit the proviso.

618. BOND, INVENTORY AND ACCOUNTS.

(b) Such trustee or trustees, before taking charge of such estate, shall give bond in twice the amount of the personal property, and seven years' rental of real estate, with sufficient corporate security or two sufficient individual sureties, to be approved by said court, for the faithful discharge of his or their duties, and shall, within thirty days after his or their appointment, file an inventory of said estate, and render an account at least once in three years, or oftener if required by said court; *Provided*, That in the case of a corporation duly authorized by its charter or by law to act as such trustee, said court may permit such corporation to give its own bond without surety.

NOTE.—This is Section 2 of the Act of April 11, 1879, P. L. 21, 4 Purd. 4904, with the insertion of the words "trustee or" in the first line, of the provisions as to corporate or individual sureties and of the proviso.

619. DUTIES OF TRUSTEE WHEN ABSENT PERSON RETURNS OR DIES WITHIN SEVEN YEARS OR WHERE LETTERS TESTAMENTARY OR OF ADMINISTRATION ARE ISSUED ON THE GROUND OF HIS PRESUMED DEATH.

(c) If such person so being absent shall return before the expiration of seven years from the time when he was last heard of, or before letters testamentary or of administration shall have been issued in his estate on the ground of his presumed death, or, in case such letters shall have been so issued, before the said trustee or trustees shall have paid or delivered over the property or estate to the executors or administrators so appointed, then said trustee or trustees shall render an account and restore to such person the property and estate after deducting the reasonable expenses of said trust and compensation of said trustee or trustees. If such absent person shall die within such period of seven years, and letters testamentary or of administration shall be duly issued in his estate, or if, after the expiration of said period of seven years, letters testamentary or of administration

shall be issued in his estate on the ground of his presumed death, then said trustee or trustees shall render an account and pay and deliver over to the executors or administrators of such person the property and estate after deducting expenses and compensation as aforesaid.

NOTE.—This is founded upon Section 3 of the Act of April 11, 1879, P. L. 21, 4 Purd. 4904, which has been redrafted in order to avoid conflict with the provisions of the new act as to presumed decedents.

Section 4 of the Act of April 11, 1879, P. L. 21, 4 Purd. 4905, validating previous cases, seems to serve no purpose now, and should be repealed.

620. IMMATERIAL VARIATION FROM FORMS NOT TO VITIATE PROCEEDINGS.

SECTION 61. No immaterial variation from the forms given and prescribed in and by this act, shall vitiate or render void any proceedings in which said forms shall be used.

NOTE.—This is Section 43 of the Act of March 15, 1832, 1 Purd. 1072.

622. SHORT TITLE.

SECTION 62. This act shall be known and may be cited as the Fiduciaries Act of 1917.

623. REPEALER.

SECTION 63. The following acts and parts of acts of assembly are hereby repealed as respectively indicated. The repeal of the first section of an act shall not repeal the enacting clause.

An act entitled "An Act directing the order of payment of debts of persons deceased," passed January 12, 1705—6, 2 Statutes at Large, 198, Chapter 134, absolutely.

Section 2 to 7 inclusive, and 10 to 13 inclusive, of an act entitled "An Act for establishing orphans' courts," passed March 27, 1713, 1 Sm. L. 81, absolutely.

An act entitled "An Act for the more easy recovery of legacies," passed March 21, 1772, 1 Sm. L. 383, absolutely.

Section 5 of an act entitled "An Act for prevention of frauds and perjuries," passed March 21, 1772, 1 Sm. L. 389, absolutely.

An act entitled "An Act for continuing an act, entitled An Act for the more easy recovery of legacies," passed October 9, 1779, 1 Sm. L. 473, absolutely.

Section 8 of an act entitled "An Act to establish the judicial courts of this commonwealth, in conformity to the alterations and amendments in the constitution," passed April 13, 1791, 3 Sm. L. 28, absolutely.

An act entitled "An Act to enable executors and administrators, by leave of court, to convey lands and tenements contracted for with their decedents, and for other purposes therein mentioned," passed March 31, 1792, 3 Sm. L. 66, absolutely.

Sections 1, 2, and 14 to 21 inclusive of an act entitled "An Act directing the descent of intestates' real estates, and distribution of their personal estates, and for other purposes therein mentioned," passed April 19, 1794, 3 Sm. L. 143, absolutely.

Sections 1 to 4 inclusive, and 9, of an act entitled "An Act supplementary to the act, entitled 'An Act directing the descent of intestates real estates, and distribution of their personal estates, and for other purposes therein mentioned,'" passed April 4, 1797, 3 Sm. L. 296, absolutely.

An act entitled "An Act declaring the power and authority given by any last will and testament to executors to sell and convey real estates, to be and remain in the survivors or survivor of them, unless otherwise expressed in the will of the testator, and for other purposes therein mentioned," passed March 12, 1800, 3 Sm. L. 433, absolutely.

An act entitled "An Act authorizing executors and administrators, in certain cases, to convey lands sold by their decedents by order of orphans' court," approved April 2, 1802, P. L. 133, absolutely.

An act entitled "A supplement to the act entitled, 'An Act to enable executors and administrators, by leave of court, to convey lands and tenements contracted for with their decedents, and for other purposes therein mentioned,'" approved March 12, 1804, P. L. 271, absolutely.

Section 3 of an act entitled "An Act to amend certain parts of an act, entitled 'An Act supplementary to the several acts of this commonwealth, concerning partitions and for other purposes therein mentioned,'" approved March 26, 1808, P. L. 144, absolutely.

Section 2 of an act entitled "An Act relative to dower, and for other purposes," approved April 1, 1811, P. L. 198, absolutely.

An act entitled "A supplement to the act entitled, 'An Act declaring the power and authority given by any last will and

testament to executors to sell and convey real estates, to be and remain in the survivors or survivor of them, unless otherwise expressed in the will of the testator, and for other purposes therein mentioned,'” approved February 7, 1814, P. L. 44, absolutely.

An act entitled, “An Act to compel trustees to account in certain cases, and for other purposes,” approved February 17, 1818, P. L. 104, in so far as it relates to testamentary trustees.

An Act entitled, “A further supplement to the act entitled ‘An Act to enable executors and administrators by leave of the court to convey lands and tenements contracted for with their decedents, and for other purposes,’” approved March 10, 1818, P. L. 183, absolutely.

Section 7 of an act entitled, “An Act to compel assignees to settle their accounts, and for other purposes,” approved March 24, 1818, P. L. 285, in so far as it relates to fiduciaries subject to the jurisdiction of the orphans’ court.

Section 2 of an act entitled “An Act to limit the time of appeal in cases of divorce, and of the settlement of the accounts of guardians, executors and administrators,” approved February 8, 1819, P. L. 58, absolutely.

Section 2 of an act entitled “A further supplement to an act, entitled ‘An Act to enable the executors and administrators by leave of court, to convey lands and tenements contracted for with their decedents, and for other purposes therein mentioned,’ passed the thirty-first of March, one thousand seven hundred and ninety-two,” approved February 5, 1821, P. L. 25, absolutely.

An act entitled “An Act relative to guardians of minor children,” approved March 30, 1821, P. L. 153, absolutely.

Section 2 of an act entitled, “An Act to encourage domestic industry, and promote the comfort of the poor,” approved March 31, 1821, P. L. 178, absolutely.

An act entitled “A further supplement to the act entitled, ‘An Act directing the descent of intestates, real estates and distribution of their personal estates, and for other purposes therein mentioned,’” approved April 1, 1823, P. L. 286, absolutely.

Section 1 of an act entitled “An Act to enable executors, administrators, guardians, and other trustees, to invest their trust moneys,” approved February 18, 1824, P. L. 25, in so far as it relates to fiduciaries subject to the jurisdiction of the orphans’ court.

An act entitled "An Act to prevent the failure of trusts," approved March 22, 1825, P. L. 107, in so far as it relates to testamentary trustees.

Section 1 of an act entitled "A supplement to the intestate law of this commonwealth," approved April 8, 1826, P. L. 255, absolutely.

Section 3 of an act entitled "An Act for the relief of the poor," approved April 10, 1828, P. L. 285, absolutely.

Sections 1 and 2 of an act entitled "An Act to prevent the failure of trusts, to provide for the settlement of accounts of trustees and for other purposes," approved April 14, 1828 P. L. 453, in so far as they relate to testamentary trustees.

Sections 1 and 2 of an act entitled "An Act concerning executors," approved April 3, 1829, P. L. 122, absolutely.

An act entitled "A further supplement to the act directing the descent of intestates' real estates and distribution of their personal estates, and for other purposes therein mentioned, passed the nineteenth day of April, seventeen hundred and ninety-four," approved April 7, 1830, P. L. 347, absolutely.

Sections 6, 14, 15, 16, 18 to 24 inclusive, 26 to 30 inclusive, 43 and 44 of an act entitled "An Act relating to registers and registers' courts," approved March 15, 1832, P. L. 135, absolutely.

Sections 5 to 34 inclusive, 47, 53 and 54 of an act entitled "An Act relating to orphans' courts," approved March 29, 1832, P. L. 190, absolutely.

Sections 1 and 41 inclusive, 43, 45 to 61 inclusive, 66, 67 and 68 of an act entitled "An Act relating to executors and administrators," approved February 24, 1834, P. L. 73, absolutely.

Sections 1 and 3 of an act entitled "Supplement to the act passed the twenty-ninth day of March, Anno Domini, one thousand eight hundred and thirty-two, entitled 'An Act relating to orphans' courts,'" approved April 14, 1835, P. L. 275, absolutely.

Sections 12 and 13 of an act entitled "A supplement to the act entitled 'An Act to establish the district court for the city and county of Philadelphia,' passed the twenty-eight day of March, one thousand eight hundred and thirty-five," approved March 11, 1836, P. L. 76, in so far as they relate to testamentary trustees.

Sections 15 to 21 inclusive and 23 to 26 inclusive of an act entitled "An Act relating to assignees for the benefit of creditors, and other trustees," approved June 14, 1836, P. L. 628, in so far as they relate to testamentary trustees.

Section 3 of an act entitled "An Act supplementary to the various acts relating to orphans' and registers courts, and executors and administrators, and the act relating to the measurement of grain, salt, and coal," approved June 16, 1836, P. L. 682, absolutely.

Section 2 of an act entitled "An Act to empower the court of common pleas for the city and county of Philadelphia to appoint assignees or trustees in the place of the deceased assignees or trustees of John Vaughan, and for other purposes," approved March 17, 1838, P. L. 80, in so far as it relates to the orphans' court.

Sections 1 and 2 of an act entitled "A further supplement to an act, entitled 'An Act relating to orphans' courts,' passed the twenty-ninth day of March, one thousand eight hundred and thirty-two, and the supplement thereto, passed the fourteenth of April, one thousand eight hundred and thirty-five, and for other purposes," approved April 13, 1840, P. L. 319, absolutely.

Section 1 of an act entitled "An Act relating to orphans' courts, and for other purposes," approved October 13, 1840, P. L. (1841) 1, absolutely.

Section 5 of an act entitled "A further supplement to the act entitled 'An Act to establish the district court of the city and county of Philadelphia,' passed the twenty-eight day of March, one thousand eight hundred and thirty-five, and for other purposes," approved March 12, 1842, P. L. 66, absolutely.

Section 52 of an act entitled "An Act concerning the trust estate of Hugh Roberts, deceased, and for other purposes," approved July 16, 1842, P. L. 374, absolutely.

Section 22 of an act entitled "An Act to authorize the governor to incorporate the Delaware Canal Company, and for other purposes," approved April 13, 1843, P. L. 237, absolutely.

Section 9 of an act entitled "An Act in regard to certain entries in ledgers in the city of Pittsburgh, and relating to the publishing of sheriffs' sales, and for other purposes," approved April 22, 1846, P. L. 476, absolutely.

Section 1 of an act entitled "An Act relative to the appointment of trustees by orphans' court, and for other purposes," approved April 22, 1846, P. L. 483, absolutely.

An act entitled "An Act to enable the executors and administrators of decedents to perfect title to real estate in certain cases," approved February 8, 1848, P. L. 27, absolutely.

Section 9 of an act entitled "A supplement to an act, entitled 'An Act relative to the LeRaysville Phalanx,' passed March, Anno Domini one thousand eight hundred and forty-seven, and relative to obligors and obligees, to secure the right of married women, in relation to defalcation, and to extend the boundaries of the borough of Ligonier," approved April 11, 1848, P. L. 536, in so far as it relates to letters of administration.

An act entitled "An Act relative to sales made by persons acting in a fiduciary capacity," approved March 14, 1849, P. L. 164, in so far as it relates to powers to sell or let real estate on ground rent, contained in any will or testamentary writing.

Section 2 of an act entitled "A further supplement to an act, entitled 'An act authorizing the Governor to incorporate the Mill Creek and Mine Hill navigation and railroad company,' passed the seventh day of February, Anno Domini, one thousand eight hundred and twenty-eight; and in relation to orphans' court deeds," approved April 9, 1849, P. L. 511, absolutely.

Sections 5, 13 and 16 of an act entitled "A supplement to an act relative to the venders of mineral waters; and an act relative to the Washington Coal Company; to sheriffs' sales of real estate; to the substitution of executors and trustees when plaintiffs; to partition in the courts of common pleas, and for other purposes," approved April 9, 1849, P. L. 524, absolutely.

Section 2 of an act entitled "An Act relative to sheriffs' sales, and to the appointment of trustees in the county of Philadelphia, and to the appointment of trustees; incorporating the First Presbyterian Church of Pottstown, Montgomery County, and changing the venue of a certain suit in Huntingdon County," approved April 10, 1849, P. L. 597, absolutely.

Section 1 of an act entitled "An Act relating to conveyances by trustees," approved March 14, 1850, P. L. 195, in so far as it relates to fiduciaries subject to the jurisdiction of the orphans' court.

Sections 1, 5 and 44 of an act entitled "An Act relating to the bail of executrixes; to partition in the orphans' court and common pleas; to colored convicts in Philadelphia; to the limitation of actions against corporations; to actions enforcing the payment of ground rent; to trustees of married women; to appeals from awards of arbitrators by corporations; to hawkers and peddlers in the counties of Butler and Union; to the payment of costs in actions by informers in certain cases; to taxing lands situate in

different townships; and in relation to fees of county treasurers of Lycoming, Clinton and Schuylkill; to provide for recording the accounts of executors, administrators, guardians and auditors' reports; and to amend and alter existing laws relative to the administration of justice in this commonwealth," became a law April 25, 1850, by reason of the Governor's failure to return it within ten days, P. L. 569, absolutely.

Sections 22 and 23 of an act entitled "An Act to incorporate the Wyoming County Mutual Insurance Company; relating to Library Street, in the city of Philadelphia; giving jurisdiction to the court of common pleas in Tioga County, in a certain divorce case; and relating to paving in front of the prison in the county of Philadelphia," approved April 26, 1850, P. L. 577, except in so far as they relate to recognizances in partition, and section 25 of said act, absolutely.

Section 8 of an act entitled "An act relative to the Columbia Lyceum and Mechanics' Institute; to the act relating to inspections; to the claims of David King, of Venango county; and of the heirs of John Bennet, of Lycoming county, deceased; to authorize James T. Crabb to sell certain gun-powder in the County of Philadelphia; relative to the estate of Francis Harley, senior, deceased; and a supplement to an act relating to registers and registers' courts, passed March fifteenth, one thousand eight hundred and thirty-two," approved May 15, 1850, P. L. 764, absolutely.

Section 6 of an act entitled "An Act supplementary to an act passed the twenty-ninth day of March, one thousand eight hundred and thirty-two, entitled 'An act relating to orphans' courts,' and relating to contracts of decedents and escheats in certain cases, and relative to the District Court of the City and County of Philadelphia, and to Registers of Wills," approved April 3, 1851, P. L. 305, absolutely.

Section 5 of an act entitled "An Act relating to the commencement of actions to judgments and decrees for the payment of money to the widows and children of decedents, to partitions in the common pleas, relative to penalties on telegraph operators, to pleadings in certain actions of debt, to actions of ejectments, to the protection of fences, to partnerships, to limitations of writs of entry in manors, lands, and tenements, to the exemption laws, to reports of the supreme court, to appeals relating to wards, boroughs, and township officers, to the acknowledgments of deeds

and sequestration of life estates," approved April 14, 1851, P. L. 612, absolutely.

Section 18 of an act entitled "An Act to incorporate a company to erect a bridge over the river Schuylkill at Spring Mill, in Montgomery County, relative to the nineteenth section of 'An Act regulating certain election districts, &c.' approved March twenty-ninth, eighteen hundred and fifty-one, to school directors in Philadelphia county, to actions for damages sustained by injuries done to the person by negligence or default, relative to the accounts of John Humes, deceased, to authorize the trustees of the Seventh Presbyterian Church of Philadelphia to convey certain real estate, to security for moneys loaned by wives to husbands, to unpaid school taxes in Bradford County, and relative to service of process on agents of joint stock companies," approved April 15, 1851, P. L. 669, absolutely.

An act entitled "A supplement to an act relating to executors and administrators, passed February twenty-fourth, one thousand eight hundred and thirty-four," approved February 2, 1853, P. L. 31, absolutely.

An act entitled "An Act to give power to the orphans' court to grant relief in certain cases," approved February 23, 1853, P. L. 98, absolutely.

Section 1 of an act entitled "An Act relative to bringing suits by creditors and others against executors, administrators, assignees and other trustees in certain cases, and serving notices and for satisfaction of mortgages, and opening judgments in certain cases," approved March 27, 1854, P. L. 214, in so far as it relates to fiduciaries subject to the jurisdiction of the orphans' court.

Section 2 of an act entitled "A supplement to an act, entitled 'An Act relating to the sale and conveyance of real estate,'" approved April 13, 1854, P. L. 368, in so far as it relates to fiduciaries subject to the jurisdiction of the orphans' court.

An act entitled "A supplement to the act relating to executors and administrators," approved May 5, 1854, P. L. 570, absolutely.

Sections 2 and 5 inclusive of an act entitled "A supplement to an act relating to assignees for the benefit of creditors and other trustees," approved May 3, 1855, P. L. 415, in so far as they relate to testamentary trustees.

Section 4 of an act entitled "An Act relating to the rights of property of husband and wife," approved April 11, 1856, P. L. 315, absolutely.

An act entitled "An Act respecting the estates of non-resident wards," approved April 21, 1856, P. L. 495, absolutely.

Section 8 of an act entitled "An Act for the greater certainty of title and more secure enjoyments of real estate," approved April 22, 1856, P. L. 532, absolutely.

An act entitled "An Act relating to testamentary trustees," approved March 13, 1859, P. L. 611, absolutely.

Section 1 of an act entitled "An Act relative to orphans' courts," approved March 22, 1859, P. L. 207, absolutely.

An act entitled "A supplement to the act, entitled 'An Act relating to executors and administrators,' approved the twenty-fourth day of February, Anno Domini, one thousand eight hundred and thirty-four," approved April 6, 1859, P. L. 384, absolutely.

An act entitled "An Act to extend the jurisdiction of the orphans' courts in case of testamentary trusts," approved April 7, 1859, P. L. 406, absolutely.

An act entitled "An Act relative to the exemption of three hundred dollars, and to the widows and children of decedents," approved April 8, 1859, P. L. 425, in so far as it relates to the exemption allowed to the widow or children of any decedent.

An act entitled "An Act relating to executors, administrators and guardians," approved April 13, 1859, P. L. 604, absolutely.

An act entitled "An Act relative to the lien of legacies," approved May 1, 1861, P. L. 420, absolutely.

An act entitled "An Act authorizing surviving executors and administrators to execute and deliver deeds of conveyance in certain cases," approved May 1, 1861, P. L. 431, in so far as it relates to fiduciaries subject to the jurisdiction of the orphans' court.

An act entitled "An Act relating to executors and other trustees," approved May 1, 1861, P. L. 680, in so far as it relates to fiduciaries subject to the jurisdiction of the orphans' court.

An act entitled "An Act regulating certain charges of executors and trustees," approved March 17, 1864, P. L. 53, absolutely.

An act entitled "An Act extending the provisions of the second section of the act of April tenth, one thousand eight hundred and forty-nine, entitled 'An Act relative to sheriffs' sales, and the appointment of trustees, in the county of Philadelphia, et cetera,' to the several counties of this commonwealth," approved April 23, 1864, P. L. 550, absolutely.

An act entitled "An Act relating to the appointment of guardians," approved August 25, 1864, P. L. 1029, absolutely.

An act entitled "An Act providing additional remedies against trustees of a trust created for life, or during marriage, and providing a remedy for the protection of their sureties," approved March 27, 1865, P. L. 44, in so far as it relates to testamentary trustees.

An act entitled "An Act supplementary to the act to set apart, for the use of the widow, or children, of a decedent, three hundred dollars of the estate of said decedent, approved April fourteenth, one thousand eight hundred and fifty-one," approved November 27, 1865, P. L. (1866) 1227, absolutely.

An act entitled "Supplement to an act, entitled 'An Act providing additional remedies against trustees of a trust, created for life, or during marriage, and providing a remedy for the protection of their sureties,' approved March twenty-seventh, one thousand eight hundred and sixty-five," approved April 17, 1866, P. L. 111, in so far as it relates to trustees subject to the jurisdiction of the orphans' court.

An act entitled "An Act enlarging the powers of the orphans' court, so as to discharge liens on real estate," approved May 17, 1866, P. L. 1096, absolutely.

An act entitled "A supplement to the act of the fifteenth of March, Anno Domini one thousand eight hundred and thirty-two, entitled 'An Act relating to registers and registers' courts,'" approved April 15, 1867, P. L. 86, absolutely.

An act entitled "An Act to authorize the court of common pleas and orphans' court of the city of Philadelphia to appoint and remove trustees," approved April 9, 1868, P. L. 785, in so far as it relates to trustees subject to the jurisdiction of the orphans' court.

An act entitled "An Act relating to orphans' courts, conferring upon said courts power to define boundaries in certain cases of devises and conveyances for life or term of years," approved April 14, 1868, P. L. 97, absolutely.

Section 1 of an act entitled "An Act relating to the appointment of auditors in the courts of the county of Montgomery," approved February 18, 1869, P. L. 183, absolutely.

An act entitled "An Act relative to actions of trespass and for mesne profits," approved April 12, 1869, P. L. 27, absolutely.

An act entitled "An Act for the protection of contingent interests," approved April 17, 1869, P. L. 70, absolutely.

An act entitled "An Act relating to the appraisement of real estate devised by any last will and testament within this commonwealth," approved April 17, 1869, P. L. 72, absolutely.

An act entitled "A supplement to an act relating to assignees for the benefit of creditors and other trustees, approved June fourteenth, one thousand eight hundred and thirty-six," approved May 17, 1871, P. L. 269, in so far as it relates to fiduciaries appointed by the orphans' court or by virtue of any last will or testament.

An act entitled "A further supplement to an act entitled, 'An Act relating to executors and administrators, approved twenty-fourth of February, one thousand eight hundred and thirty-four,'" approved May 17, 1871, P. L. 269, absolutely.

An act entitled "A further supplement to an act, entitled 'A further supplement to an act relating to orphans' courts,' passed the twenty-ninth day of March, one thousand eight hundred and thirty-two, and the supplement, passed fourteenth of April, one thousand eight hundred and thirty-five, and the further supplement, passed fourteenth of April, one thousand eight hundred and forty," approved May 25, 1871, P. L. 279, absolutely.

An act entitled "An Act providing for the entry of certain proceedings on the judgment indexes of the several courts of this commonwealth," approved June 15, 1871, P. L. 387, in so far as it relates to proceedings to revive and continue the lien of debts against a decedent's real estate.

An act entitled "An Act relating to foreign executors, administrators, guardians and representatives of decedents and wards," approved April 8, 1872, P. L. 44, absolutely.

An act entitled "An Act to provide for the recording of deaths of testators and intestates in the office of register of wills," approved May 15, 1874, P. L. 194, absolutely.

An act entitled "An Act relative to the transfer of the loans of this commonwealth, and of the city of Philadelphia, and to amend the provisions of the twenty-second section of an act, entitled 'An Act to authorize the Governor to incorporate the Delaware Canal Company, and for other purposes,' approved the thirteenth day of April, eighteen hundred and forty-three, and extending the same to the holders of any loans of this commonwealth, or of the city of Philadelphia, domiciled or resident out of this commonwealth, who shall have heretofore died or hereafter die," approved May 15, 1874, P. L. 195, absolutely.

The proviso to Section 6 of "An Act relating to the organization and jurisdiction of orphans' courts, and to establish a separate orphans' court in and for counties having more than one hundred and fifty thousand inhabitants, and to provide for the election of judges thereof," approved May 19, 1874, P. L. 206, absolutely.

An Act entitled "An Act to validate sales and conveyances, under the decrees of courts of this commonwealth, by persons irregularly or improperly appointed or defectively qualified," approved April 28, 1876, P. L. 50, in so far as it relates to proceedings in the orphans' court.

An act entitled "A further supplement to an act, entitled 'An Act relating to orphans' court,' approved the twenty-ninth day of March, Anno Domini one thousand eight hundred and thirty-two, designed to extend the fourteenth section of said act, so as to authorize investments by executors, trustees and other persons holding property in a fiduciary capacity in bonds or certificates of debt created by any of the counties, cities or municipal corporations of this commonwealth," approved May 8, 1876, P. L. 133, absolutely.

An act entitled "An Act relating to the execution of trusts by corporations," approved February 16, 1877, P. L. 3, in so far as it relates to fiduciaries subject to the jurisdiction of the orphans' court.

Sections 1 and 2 of an act entitled "An Act to provide for and to validate the execution and delivery of deeds and conveyances of real estate, in cases in which administrators, executors, guardians and trustees, may die or have died, between the time of sale and the time appointed for the payment of purchase money and delivery of the conveyance, and also in cases in which the administrator, executor, guardian or trustee may have received authority from the proper court to purchase real estate sold by him, either under the provisions of any last will and testament, or by the authority or under the direction of any court having jurisdiction to make a decree, directing such real estate to be sold," approved May 22, 1878, P. L. 83, in so far as they relate to the orphans' court.

Sections 1, 2 and 3 of an act entitled "An Act to provide for the appointment of trustees *durante absentia*, and defining the powers and duties of the same," approved April 11, 1879, P. L. 21, absolutely.

An act entitled "An Act to regulate the compensation of auditors and commissioners," approved June 4, 1879, P. L. 84, in so far as it relates to auditors and commissioners appointed by the orphans' court.

An act entitled "A supplement to extend the provisions of an act, entitled 'An Act providing additional remedies against trustees of a trust created for life, or during marriage, and providing a remedy for the protection of their sureties,' approved the twenty-seventh day of March Anno Domini, one thousand eight hundred and sixty-five, to the orphans' courts of the respective counties of this commonwealth," approved May 10, 1881, P. L. 14, in so far as it relates to trustees subject to the jurisdiction of the orphans' court.

An act entitled "A supplement to an act, approved April thirteen, one thousand eight hundred and fifty-nine, entitled 'An Act relating to executors, administrators and guardians,'" approved June 10, 1881, P. L. 106, absolutely.

An act entitled "An Act to confer power on the several orphans' courts having jurisdiction of the accounts of executors and administrators to order and direct a sale for the payment of the debts of such decedent of any lands lying partly in two or more counties," approved June 4, 1883, P. L. 65, absolutely.

An act entitled "An Act providing the manner in which widows' and children's exemption in decedents' estates shall and may be set aside to them in certain cases," approved June 4, 1883, P. L. 74, absolutely.

An act entitled "An Act to permit foreign executors or administrators to issue *scire facias* to preserve and continue the lien or liens of judgments in favor of decedents within this commonwealth, and before letters of administration have been taken out within this state," approved June 27, 1883, P. L. 163, absolutely.

An act entitled "An Act relating to the grant of letters of administration upon the estates of persons, presumed to be dead, by reason of long absence from their former domicile," approved June 24, 1885, P. L. 155, absolutely.

An act entitled "An Act limiting the time within which action may be brought upon refunding bonds given upon the distribution or partition of estates of decedents," approved June 30, 1885, P. L. 203, absolutely.

An act entitled "An Act authorizing executors or trustees to unite with others in the organization of corporations," approved April 22, 1889, P. L. 42, absolutely.

An act entitled "An Act to authorize courts, having cognizance of trusts created by deed or will, to direct trust funds to be placed in the custody of trustees appointed by the courts of another state or territory of the United States, in cases where the person or persons beneficially interested in such trust have removed to such other state or territory of the United States," approved May 8, 1889, P. L. 123, in so far as it relates to trusts created by will.

An act entitled "An Act relating to orphans' court sales," approved May 9, 1889, P. L. 182, absolutely.

An act entitled "An Act amending an act, entitled 'An Act respecting the estate of non-resident wards,' approved the twenty-first day of April, Anno Domini one thousand eight hundred and fifty-six, extending the provisions thereof so that the same may apply to trustees and *cestui que trusts*," approved May 13, 1889, P. L. 190, absolutely.

Section 2 of an act entitled "An Act relating to judicial sales and the preservation of the lien of mortgages," approved May 19, 1893, P. L. 110, absolutely.

An act entitled "An Act to enable the surety of any trustee, committee, guardian, assignee, receiver, administrator, executor, or other trustee, or any person interested in the trust, to require the filing of statements exhibiting the manner of the investment of the trust funds, and providing for the removal of such trustee, committee, guardian, assignee, receiver, administrator, executor, or other trustee, by the court," approved June 3, 1893, P. L. 273, in so far as it relates to fiduciaries subject to the jurisdiction of the orphans' court.

An act entitled "An Act regulating the satisfaction, extinguishment or discharge of dowers, legacies or other charges upon land, by judicial decree where the legal presumption of payment of the same exists from lapse of time, or where payment of the same has been made in full and no satisfaction, extinguishment, release thereof appears of record," approved June 8, 1893, P. L. 356, absolutely.

An act entitled "An Act to limit the duration of the lien of the debts of decedents other than those of record on their real estate," approved June 8, 1893, P. L. 392, absolutely.

An act entitled "An Act providing for the release and discharge of encumbrances or charges on land in all cases in which the period of twenty-one years has elapsed after the principal of the encumbrance or charge has become due and payable, and no pay-

ment has been made within such period of twenty-one years on account of such encumbrance or charge by the owner or owners of the land sought to be released and discharged and no sufficient release is of record in the county, and regulating proceedings for such release and discharge," approved May 8, 1895, P. L. 44, in so far as it relates to the orphans' court.

An act entitled "A supplement to an act, entitled 'An Act relating to executors and administrators,' approved February twenty-fourth, one thousand eight hundred and thirty-four, relating to the lien of judgments against decedents," approved June 18, 1895, P. L. 197, absolutely.

Section 1 of an act entitled "An Act providing that the right of action for injury wrongfully done to the person shall survive against the personal representative of the wrong-doer, and limiting the time within which suit for such injury must be brought," approved June 24, 1895, P. L. 236, absolutely.

An act entitled "An Act to allow receivers, assignees, guardians, committees, trustees, executors and administrators to include in the lawful expenses of executing their trusts such reasonable sum paid a company, authorized under the laws of this state so to do, for becoming their surety as may be by court allowed, not exceeding one per centum per annum on the amount of such bonds," approved June 24, 1895, P. L. 248, in so far as it relates to fiduciaries subject to the jurisdiction of the orphans' court.

An act entitled "An Act to authorize executors and trustees, non-residents of the commonwealth, to convey real estate," approved June 23, 1897, P. L. 200, absolutely.

An act entitled "An Act authorizing the payment into the orphans' court of the money due on dowers, legacies or other charge upon land where the person or persons to whom the dower, legacy or other charge upon land is due and payable cannot be found, and providing for the satisfaction, extinguishment or discharge thereof, and to ascertain the amount thereof," approved July 14, 1897, P. L. 269, absolutely.

An act entitled "An Act enlarging the powers of the orphans' court, and to provide a further remedy for the collection of dower interest due to widows," approved April 28, 1899, P. L. 120, absolutely.

An act entitled "An Act authorizing the orphans' courts of the commonwealth to decide specific performance of written contracts, and also parol contracts when so far executed that it would be

inequitable to rescind, for the sale of real estate, where the vendor has died without conveying, and in cases where the vendee has died without having paid the purchase money, and authorizing the recording of the decrees in such cases in the counties where the real estate lies," approved April 28, 1899, P. L. 157, absolutely.

An act entitled "An Act to allow an executor, administrator, guardian, assignee, or trustee to institute an action at law, or other legal or equitable proceedings, against a co-executor, administrator, guardian, assignee or trustee, to recover or enforce any debt or obligation individually due the estate which he represents," approved May 11, 1901, P. L. 174, in so far as it relates to fiduciaries subject to the jurisdiction of the orphans' court.

An act entitled "An Act to confer on the several orphans' courts having jurisdiction of the accounts of guardians, power to order and direct a mortgage or a public or private sale, for the payment of debts or for other purposes, of any lands lying partly in two or more counties, divided by county lines," approved May 21, 1901, P. L. 272, absolutely.

An act entitled "An Act to amend the first section of an act, entitled 'An Act to limit the duration of the lien of the debts of decedents, other than those of record, on their real estate,' approved the eight day of June, Anno Domini one thousand eight hundred and ninety-three, and to extend the provisions of said act so as to limit the duration of the lien upon real estate of the decedents, other than those secured by mortgage or by judgment entered or revived by *scire facias* within five years prior to the death of such decedent," approved June 14, 1901, P. L. 562, absolutely.

Section 1 of an act entitled "An Act authorizing the orphans' court to adjudge real estate to persons, to whom the right to take the same at a certain valuation has been given in a will, and who are appointed executors of the same will; providing for the payment of the purchase money, and confirming titles to real estate heretofore taken under similar proceedings," approved March 5, 1903, P. L. 10, absolutely.

An act entitled "An Act providing for the voting of shares of stock in corporations in this commonwealth, held by executors, administrators, guardians, and trustees, and the manner of voting the same," approved March 16, 1905, P. L. 42, in so far as it relates to fiduciaries subject to the jurisdiction of the orphans' court.

An act entitled "An Act to amend the first section of an act approved the eleventh day of April, Anno Domini one thousand eight hundred and seventy-nine, entitled 'An Act to provide for the appointment of trustees *durante absentia*, and defining the powers and duties of the same,' providing for the appointment of a trustee of the estate of any absentee, who has been a resident of this commonwealth or of any other state, territory or foreign country, who has left either real or personal estate, or both, in this commonwealth," approved March 30, 1905, P. L. 77, absolutely.

An act entitled "An Act to regulate the transfer of funds from executors and administrators, in this commonwealth, to foreign executors and administrators," approved March 31, 1905, P. L. 91, absolutely.

An act entitled "An Act to extend the statute of limitations to debts or demands arising or falling due to the estate of a decedent after the death of such decedent," approved April 6, 1905, P. L. 114, absolutely.

An act entitled "A supplement to an act, entitled 'An Act relating to the granting of letters of administration upon the estates of persons, presumed to be dead, by reason of long absence from their former domicile,' approved June twenty-fourth, one thousand eight hundred and eighty-five; providing for the probate of a will of a person whose death, by presumption has been established, and for attachment of such will to letters of administration granted in the case," approved April 14, 1905, P. L. 153, absolutely.

An act entitled "An Act to amend an act approved the seventeenth day of May, one thousand eight hundred and sixty-six, entitled 'An Act enlarging the powers of the orphans' court, so as to discharge liens on real estate,' so as to include charges on real estate by the provisions of a last will and testament, or otherwise," approved March 22, 1907, P. L. 29, absolutely.

An act entitled "An Act authorizing employers to pay to the wife, children, brother or sister, father or mother, boarding-house keeper, undertaker, nurse, or physician wages due a deceased employe," approved May 23, 1907, P. L. 201, absolutely.

An act entitled "An Act to allow receivers, assignees, guardians, committees, trustees, executors, and administrators to include in the lawful expenses of executing their trust such reasonable sum paid a company, authorized under the laws of this state so to do, for guaranteeing the payment of the principal and interest of

mortgages or other securities in which they are required to invest the funds of their estate, not exceeding one-half of one per centum per annum on the principal of such mortgage or other securities," approved May 28, 1907, P. L. 271, in so far as it relates to fiduciaries subject to the jurisdiction of the orphans' court.

An act entitled "An Act to provide for the discharge of sureties upon bonds of trustees, committees, guardians, assignees, receivers, executors, administrators, and other fiduciaries," approved June 1, 1907, P. L. 384, in so far as it relates to fiduciaries subject to the jurisdiction of the orphans' court.

An act entitled "An Act authorizing the parties in interest, or their counsel, to select auditors and masters needed in judicial proceedings; except in divorce cases," approved April 1, 1909, P. L. 95, in so far as it relates to proceedings in the orphans' court.

An act entitled "An Act to amend sections twenty-nine and thirty of an act, approved the twenty-ninth day of March, Anno Domini eighteen hundred and thirty-two, entitled 'An Act relating to orphans' courts,' and validating execution and attachment execution process issued out of the courts of common pleas of this commonwealth, upon transcripts from any orphans' court of this commonwealth, for balances due from, or in the hands of, any executor, administrator, guardian, or other accountant, on the settlement of their respective accounts in the orphans' court," approved April 27, 1909, P. L. 202, except in so far as it relates to proceedings begun prior to its date.

An act entitled "An Act to limit the duration upon real estate of the debts of decedents, including the expenses of the settlement of the estate, and to provide under what conditions the lien may be continued," approved May 3, 1909, P. L. 386, absolutely.

An act entitled "An Act to provide for the filing, auditing, and confirmation, in certain cases, of accounts of trustees and of committees of lunatics and of habitual drunkards," approved May 3, 1909, P. L. 391, in so far as it relates to trustees subject to the jurisdiction of the orphans' court.

An act entitled "An Act providing that the widow or children of any decedent dying outside of this commonwealth, but whose estate is settled in this commonwealth, may retain either real or personal property belonging to said estate to the value of three hundred dollars," approved May 6, 1909, P. L. 459, absolutely.

Sections 1, 2 and 3 of an act entitled "An Act relating to private sales of real estate, ordered, decreed, or approved by the

orphans' courts; and providing a method of giving notice of such sales, and validating such private sales of real estate, heretofore made under the authority of the orphans' courts, for the payment of debts," approved June 9, 1911, P. L. 724, absolutely.

An act entitled "An Act to amend section ten of an act, approved the twenty-ninth day of March, Anno Domini one thousand eight hundred and thirty-two, entitled 'An Act relating to orphans' courts,' so as to permit the accounts of the guardians of minors' property therein mentioned and described to be examined and audited, and the matters therein contained confirmed by decree of orphans' court, with the same force and effect as the partial accounts of executors, administrators, and temporary trustees are audited, examined, allowed, and confirmed," approved June 9, 1911, P. L. 744, absolutely.

An act entitled "An Act to confer power on the several orphans' courts having jurisdiction thereof, when the balance for distribution in an estate, after the debts are paid, includes stocks, bonds, and other securities, to make distribution of the same in kind to parties entitled thereto, to authorize subsequent sales thereof, and to validate such distributions heretofore made," approved June 10, 1911, P. L. 870, absolutely.

An act entitled "An Act to provide that persons buying real estate in this commonwealth, from executors or trustees named in the last will and testament of any person dying testate, and who hold the same in trust under the provisions thereof, and who make sale of same under the power of sale in said last will and testament contained, shall take title to said real estate free and discharged of any obligation to see to the application of the purchase money," approved June 10, 1911, P. L. 874, absolutely.

An act entitled "An Act to amend an act, approved the eight day of April, Anno Domini one thousand eight hundred and seventy-two, entitled 'An Act relating to foreign executors, administrators, guardians, and representatives of decedents and wards,' by extending the provisions thereof to the assignment and satisfaction of record of mortgage debts and indentures of mortgage and to the receipt of the interest thereon," approved June 13, 1911, P. L. 890, absolutely.

An act entitled "An Act to amend an act approved the twenty-fourth day of February, one thousand eight hundred thirty-four, entitled 'An Act relating to executors and administrators,'" approved May 23, 1913, P. L. 344, absolutely.

An act entitled "An Act relating to the real estate of persons presumed to be dead, and providing a method of freeing such estate from all claim or interest of such persons," approved May 28, 1913, P. L. 369, absolutely.

An act entitled "A supplement to an act, entitled 'An Act relating to the grant of letters of administration upon the estates of persons, presumed to be dead, by reason of long absence from their former domicile,' approved June twenty-fourth, one thousand eight hundred and eighty-five; providing for the grant of ancillary letters of administration in this commonwealth, upon the estates of persons, presumed to be dead, by reason of long absence from their former domicile, in any other state, territory, or foreign country, who have left personal estate within this commonwealth," approved May 28, 1913, P. L. 373, absolutely.

An act entitled "An Act to amend an act approved the ninth day of June, one thousand nine hundred and eleven, entitled 'An Act relating to private sales of real estate, ordered, decreed, or approved by the orphans' courts; and providing a method of giving notice of such sales, and validating such private sales of real estate, heretofore made under the authority of the orphans' courts, for the payment of debts,'" approved June 12, 1913, P. L. 470, absolutely.

An act entitled "An Act to amend an act, approved the fourteenth day of April, one thousand eight hundred and fifty-one, entitled 'An Act relating to the commencement of actions, to judgments and decrees for the payment of money to the widows and children of decedents, to partitions in the common pleas, relative to penalties on telegraph operators, to pleadings in certain actions of debt, to actions of ejectments, to the protection of fences, to partnerships, to limitations of writs of entry in manors, lands and tenements, to the exemption laws, to reports of the supreme court, to appeals relating to wards, boroughs and township officers, to the acknowledgments of deeds and sequestration of life estates,' by regulating the appointment and number of appraisers," approved July 21, 1913, P. L. 877, absolutely.

Section 1 of an act entitled "An Act authorizing the several orphans' courts to empower guardians and trustees of estates of minors to elect, in writing, to take land in fee, which has been ordered to be sold by the provisions of any duly probated will, in lieu of legacies bequeathed or distributable to said minors from the proceeds of such sale, and validating certain elections to take

land in lieu of legacies heretofore made pursuant to an order of court," approved July 22, 1913, P. L. 908, absolutely.

An act entitled "An Act authorizing the orphans' court to reduce, under certain circumstances, the bond of any fiduciary; imposing duties on registers of wills in connection therewith," approved May 3, 1915, P. L. 218, absolutely.

An act entitled "An Act relative to estates of decedents," approved May 6, 1915, P. L. 265, absolutely.

An act entitled "An Act to amend an act approved the twenty-fourth day of February, one thousand eight hundred thirty-four, entitled 'An Act relating to executors and administrators,' as amended," approved May 6, 1915, P. L. 267, absolutely.

An act entitled "An Act to amend an act, entitled 'An Act to limit the duration upon real estate of the debts of decedents, including the expenses of the settlement of the estate, and to provide under what conditions the lien may be continued,' approved the third day of May, one thousand nine hundred and nine, so as to restrict the revival of judgment liens by the death of the debtor to real estate still owned by said decedent at the date of his death," approved May 14, 1915, P. L. 475, absolutely.

An act entitled "A supplement to an act approved the fourteenth day of April, one thousand eight hundred and fifty-one, entitled 'An Act relating to the commencement of actions to judgments and decrees for the payment of money to the widows and children of decedents, to partitions in the common pleas, relative to penalties on telegraph operators, to pleadings in certain actions of debt, to actions of ejectments, to the protection of fences, to partnerships, to limitations of writs of entry in manors, lands, and tenements, to the exemption laws, to reports of the supreme court, to appeals, relating to wards, boroughs, and township officers, to the acknowledgments of deeds and sequestration of life estates,' providing a method of allowing a widow's exemption, where the property consists of real estate not readily divided," approved June 1, 1915, P. L. 682, absolutely.

An act entitled "An Act to amend section three of an act, approved the fourteenth day of April, Anno Domini one thousand nine hundred and five, entitled 'A supplement to an act, entitled "An Act relating to the granting of letters of administration upon the estates of persons, presumed to be dead, by reason of long absence from their former domicile," approved June twenty-fourth, one thousand eight hundred and eighty-five; providing for the

probate of a will of a person whose death by presumption has been established, and for attachment of such will to letters of administration granted in the case,' by providing for the issuance of letters testamentary to the executor named in such will, in the same manner and form as if such supposed decedent were actually dead," approved June 1, 1915, P. L. 689, absolutely.

An act entitled "An Act to amend section five of an act, entitled 'An Act relating to the grant of letters of administration upon the estates of persons presumed to be dead, by reason of long absence from their former domicile'; approved the twenty-fourth day of June, Anno Domini one thousand eight hundred and eighty-five, by authorizing the several orphans' courts of this commonwealth to accept refunding bonds from the distributees without sureties, in certain cases," approved June 11, 1915, P. L. 945, absolutely.

All other acts of assembly, or parts thereof, that are in any way in conflict or inconsistent with this act, or any part thereof, are hereby repealed. *Provided, however,* that nothing in this act shall be construed to repeal or in any way affect the existing law requiring publication of legal advertisements or notices in legal journals or periodicals designated by rule of court for that purpose.¹

¹This proviso did not appear in the commissioners' draft.

ACT OF JULY 11, 1917 (P. L. 790.)

623. RIGHTS OF FIDUCIARIES AS TO COAL LEASES AUTHORIZING TRUSTEES, GUARDIANS, AND OTHER FIDUCIARIES TO SELL, ASSIGN, ALTER, MODIFY OR SUPPLEMENT COAL MINING LEASES, WITH THE APPROVAL OF THE COURT HAVING JURISDICTION OF THEIR ACCOUNTS.

SECTION 1. Be it enacted, &c. That from and after the passage of this act, any trustee, guardian, or other fiduciary, having an interest in any coal-mining lease, may sell, assign, and with the consent of the lessees, thereof, alter, modify or supplement such coal mining lease, with the approval of the court having jurisdiction of the accounts of such fiduciary.

The Fiduciaries Act of June 7, 1917, P. L. 447, 46 (g), abolished the concurrent jurisdiction formerly exercised by the court of common

pleas and the orphans' court over the accounts of testamentary trustees appointed nominatim by the will, and vested such jurisdiction exclusively in the orphans' court of the county where the will is probated.

Under the Act of July 11, 1917, P. L. 790, the orphans' court has jurisdiction of a petition by a testamentary trustee to modify the terms of a coal mining lease authorized by a decree of the court of common pleas. This is a remedial act and relates to procedure, and such a statute will operate, in the absence of a saving clause, to transfer jurisdiction even as the pending proceedings.

"We have now come to the conclusion that we have jurisdiction in the premises. So far as the proceedings in the court of common pleas No. 3 are concerned, it is clear that the court did no more than to authorize the trustee to make leases for the term of fifteen years, and its decrees did not authorize or direct the provision as to royalties etc., that are now alleged to be unfairly onerous upon the lessees. But although the Baird Snyder lease was specifically authorized by the decree of the court of common pleas No. 1, we are of opinion, that the jurisdiction to modify its terms is also by the Act of July 11, 1917, P. L. 790, vested in this court. That act is remedial in character, and relates to procedure; and the general rule in such cases is that such a statute will operate, in the absence of a saving clause, to transfer jurisdiction even as to pending proceedings. There is good reason in the present instance for our jurisdiction, for the account of the trustee should clearly be filed in this court, and it is eminently proper that any modification of this lease, the rentals of which would be included in an account, should also be subject to our approval." *GEST, J., in Girard's Est., 48 Pa. C. C. 608, 29 Dist. 62.*

624. PROCEDURE.

SECTION 2. The procedure under this Act shall be the same as the procedure for the sale of real estate prescribed by sections four and twelve of the Revised Price Act of one thousand nine hundred and seventeen.

See Secs. 183 and 191, *supra*.

See form 78.

See *Girard's Est., 48 Pa. C. C. 608, 29 Dist. 62.*

FORMS

OFFICIAL FORMS OF THE REGISTER OF WILLS OF PHILADELPHIA COUNTY.

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2. Oath of executor, 380, 381.
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4. Oath of subscribing witnesses where will executed by mark, 216.
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7. Oath to signature to will where no witnesses, 215.
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OFFICIAL FORMS OF REGISTER OF WILLS OF ALLEGHENY COUNTY.

31. Affidavit of death testate.
32. Citation to produce will, 267.
33. Subpoena to witness, 268.
34. Commission and deposition of witnesses to will, 269.
35. Petition for probate and letters testamentary, 358.
36. Oath of subscribing witnesses to will, 215.

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38. Citation to show cause why letters should not issue.
39. Renunciation of right to administer, 357.
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41. Bond and oath of administrator, 381-2-3.
42. Petition for letters of administration c. t. a., 358-9.
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49. Certificate of filing foreign letters of administration, 592.
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52. Inventory and appraisement, 392.
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OFFICIAL FORMS OF ORPHANS' COURT OF ALLEGHENY COUNTY.

54. Petition for distribution of intestate's estate, 552.
55. Petition for distribution under a will, 552.

MISCELLANEOUS FORMS.

(The following forms are not official, but are merely drafted from petitions which from time to time have been presented to the orphans' courts of various counties under the Acts of Assembly herein set forth. To draft a form which would suit every case is, of course, impossible and an attempt has been made only to indicate in a general way the subject matter which should appear in each petition to show the jurisdiction of the court, the status of the parties in interest and the reasons for the petition. It should be noted that in Philadelphia County under a recent ruling, it is required that the decree be placed at the beginning, rather than at the end of the petition. The forms herein for petitions under the Revised Price Act are modeled, to a large extent, on the forms given by Roland R. Foulke, Esq., in his Treatise on the Price Act. In such petitions in Philadelphia county by a recent ruling it is of importance that the affidavits by real estate experts should show that they have no interest in the subject-matter of the petition.)

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58. Petition under the Revised Price Act by executor for leave to sell real estate at private sale where no authority to sell is given in the will, 183.
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64. Petition under the Revised Price Act by guardian for leave to join with others in the private sale of real estate to avoid partition, 183.
65. Petition under the Revised Price Act by trustee for leave to sell an irredeemable ground rent at private sale, 183.
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70. Election of widow to take against will, 245.
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1. PETITION FOR PROBATE AND LETTERS TESTAMENTARY. (Sec. 358.)

To ———, Esq., Register of Wills and ex-officio Clerk of the Orphans' Court for the City and County of Philadelphia, in the Commonwealth of Pennsylvania.

In the matter of the probate of the last will and testament of ———, deceased.

The petition of ——— respectfully sheweth that ——— the Execut—— named in the last will and testament of ——— dated the — day of ——— A. D. 19— That said ——— was a citizen of the United States and resident of Philadelphia County, State of Pennsylvania, and departed this life at number ——— in the County of — and State of — on — the — day of ——— A. D., 19—, at — o'clock — M.

The said testa was possessed of personal property to the value of \$—— and of real estate (less incumbrance) to the value of \$—— as near as can be ascertained, situated as follows: ——— Therefore the said—— respectfully appl— for probate of the said last will and testament ——— and for letters testamentary thereon.

Dated ———, A. D., 19—.

Philadelphia County, ss:

———, named in the above application, being duly ——— according to law, say that the matters and things set forth in the foregoing petition are true to the best of — knowledge and belief.

——— and subscribed before me, at }
Philadelphia, ——— A. D., 19— } (Signature)

2. OATH OF EXECUTOR. 380, 381

City and County of Philadelphia, ss:

——— do — that as the ——— of the foregoing last will and testament ——— deceased, — will well and truly administer the goods and chattels, rights and credits of said deceased. according to law, and that — will diligently and faithfully regard and well and truly comply with the provisions of the law

relating to collateral inheritances. That the said testat— died on the — day of — A. D., 19—, at — o'clock — M.

— and subscribed before me,
the date above, and letters testa-
mentary granted unto } _____
(Signature)

3. OATH OF SUBSCRIBING WITNESSES. 215

Then personally appeared — the subscribing witnesses to the foregoing — deceased, and on — solemn — did say that — present and did see and hear — deceased, the testa— therein named — seal, publish and declare the same as and for — and testament — and at the doing thereof — was of sound disposing mind, memory and understanding to the best of — knowledge and belief.

— and subscribed before } _____
me, the above date. (Signatures)

4. OATH OF SUBSCRIBING WITNESSES WHERE WILL EXECUTED BY MARK. 216

City and County of Philadelphia, ss:

Then personally appeared — the subscribing witnesses to the foregoing — deceased, and on — solemn — did say that — present and did see and hear — deceased, the testa— therein named, make — mark, seal, publish and declare the same as and for — and testament — and that at the doing thereof — was of sound disposing mind, memory and understanding, to the best of — knowledge and belief. The name of testat— having been subscribed in — presence, and by — direction and authority.

— and subscribed before } _____
me, the above date. (Signatures)

5. OATH OF SUBSCRIBING WITNESSES TO WILL DISPOSING OF REAL ESTATE IN ANOTHER STATE REQUIRING SPECIAL PROOF. 215

City and County of Philadelphia, ss:

Then personally appeared — the subscribing witnesses to the foregoing — deceased, and on — solemn — did say

that — present — and did see and hear — deceased, the testa— therein named — seal, publish and declare the same as and for — and testament — and that at the doing thereof — was of sound disposing mind, memory and understanding, to the best of — knowledge and belief. And further, that the said testat— so signed the same in — presence, and at — request — the said deponents in presence and in the presence of each other — subscribed their own proper signatures and handwriting as witnesses thereto, all being present at the same time at the execution of said will.

— and subscribed before
me, the above date. } _____
(Signatures)

6. SAME, LONGER FORM. 215

City and County of Philadelphia, ss:

Then again personally appeared — the subscribing witnesses to the foregoing — deceased, and on — solemn — did say that — present together with — the other subscribing witness and did see and hear — deceased, the testat— therein named — seal, publish and declare the same as and for h— last will and testament — and that at the doing thereof testat— was of sound disposing mind, memory and understanding, to the best of — knowledge and belief. And further, that the said testat— so signed the same in — presence and at the request of testat— the said deponent in the presence of — the other subscribing witnesses, and the other subscribing witness — in the presence of the testat— and in the presence of each other — subscribed their own proper signatures and handwriting as witnesses thereto, all being present at the same time at the execution of said will.

— and subscribed before
me, the above date. } _____
(Signatures)

7. OATH TO SIGNATURE TO WILL WHERE NO WITNESSES. 215.

City and County of Philadelphia, ss:

Registers' Office, ———— 192—

Then personally appeared ———— who being duly ————

according to law, say that he—— well acquainted with
 —— the Test—— above named, in —— lifetime, and
 —— familiar with —— signature, having frequently seen——
 write —— name as well as other matters; that ——
 carefully examined the foregoing signature —— and verily
 believe —— to be in —— own proper handwriting.
 —— and subscribed
 before me, the date above.

—— *Deputy Register*

8. OATH TO SIGNATURE OF A WITNESS WHO IS DEAD OR CANNOT BE LOCATED. 215.

City and County of Philadelphia, ss:

Then personally appeared —— who being duly ——
 according to law, say that he —— well acquainted with
 —— one of the subscribing witnesses to the foregoing——
 —— deceased —— familiar with —— signature having
 frequently seen —— write —— name as well as
 other matters; that —— carefully examined the foregoing
 signature —— and verily believe —— to be in ——
 own proper handwriting ——
 —— and subscribed
 before me, the above date.

—— *Deputy Register.* }

9. DECREE OF PROBATE.

STATE OF PENNSYLVANIA,

City and County of Philadelphia

Be it Remembered, That on the —— day of ——
 A. D. 192——, before me, ——, Register of
 Wills for the City and County aforesaid, after due proof and
 hearing had, according to the Laws of the said State, IT IS
 ORDERED AND DECREED, that the last Will and Testa-
 ment —— late of said City and County,
 deceased, be duly admitted to probate and filed of record in the
 office of the Register of Wills of the said City and County.

IN TESTIMONY WHEREOF, I have hereunto set my
 hand, the day and year above written.

—— *Register*

10. PETITION FOR LETTERS OF ADMINISTRATION. 358.

TO _____, ESQ.,

Register of Wills for the

County of Philadelphia, in the

Commonwealth of Pennsylvania.

In the matter of the Administration of the Goods, Chattels, Rights and Credits of _____ Deceased

The Petition of _____ respectfully sheweth that _____ was a Citizen of United States and a resident of Philadelphia County, State of Pennsylvania, and departed this life intestate at number _____ in the County of _____ and State of _____ on the _____ day of _____ A. D. 19____ at _____ o'clock _____ M. _____ That the said _____ deceased left _____ surviving the following named widow or husband, heirs and next of kin, to wit:—

(Relationship)

(Residence)

_____ and no other next of kin.

The said intestate was possessed of Goods, Chattels, Rights and Credits, to the value of \$_____ and of real estate (less incumbrance) to the value of \$_____ as near as can be ascertained, situated as follows: _____ Therefore the said _____ respectfully appl_____ for _____ Letters of Administration _____ upon the Goods, Chattels, Rights and Credits, of which said _____ died possessed. Dated _____ A. D. 19____

Philadelphia County, ss:

_____ named in the above application, being duly _____ according to law say that the matters and things set forth in the foregoing Petition are true to the best of _____ knowledge and belief.

_____ and subscribed before me, at

Philadelphia, _____ A. D. 19____

_____ Deputy Register

} _____
(Signatures)

11. BOND AND OATH OF ADMINISTRATOR. 381-3.

Know all men by these Presents, That we _____ are held and firmly bound unto the Commonwealth of Pennsylvania, in the sum of _____ dollars, to be paid to the said

Commonwealth: To which payment well and truly to be made, we bind ourselves, jointly and severally, for and in the whole, our heirs, executors and administrators, _____ and each and every of them, firmly by these presents.

Sealed with our seals. Dated the _____ day of _____ in the year of our Lord One Thousand Nine Hundred and _____ (19....).

The Condition of this Obligation is, That if the above bounden _____ Administrat_____ of all and singular the Goods, Chattels and Credits of _____ deceased, do make, or cause to be made, a true and perfect inventory of all and singular the Goods, Chattels and Credits of the said deceased, which have come or shall come to the hands, possession or knowledge of the said Administrat_____, or into the hands and possession of any other person or persons, for_____ and the same so made, do exhibit or cause to be exhibited into the REGISTER'S OFFICE, in the County of Philadelphia, within thirty days from the date hereof, and the same Goods, Chattels and Credits, and all other the Goods, Chattels and Credits of the said deceased, at the time of _____ death, which at any time after shall come to the hands and possession of the said Administrat_____, or into the hands and possession of any other person or persons for _____ do well and truly administer according to law. And further do make or cause to be made, a just and true account of said Administration at the expiration of six months from the date hereof, or when thereunto required by the Orphans' Court. And all the rest and residue of the said Goods, Chattels and Credits which shall be found remaining upon said Administrat_____ account, the same being first examined and allowed by the Orphans' Court of the City and County of Philadelphia, shall deliver and pay unto such person or persons as the said Orphans' Court, by their decree or sentence pursuant to law, shall limit and appoint, and shall well and truly comply with the laws of this Commonwealth relating to Collateral Inheritances. And if it shall hereafter appear that any last Will and Testament was made by the said deceased, and the same shall be proved according to law, if the Said Administrat_____, being thereunto required, do surrender the said Letters of Administration into the REGISTER'S OFFICE aforesaid,

then this obligation to be void—otherwise to remain in full force.

Signed, sealed and delivered in the presence of

(Signatures)

REGISTER'S OFFICE,

City and County of Philadelphia, ss:

_____ A. D. 19____. Then personally came the within named _____ and on _____ solemn _____ did depose, declare and say, That _____ believe that the within-mentioned decedent on the _____ day of _____ A. D. 19____, at _____ o'clock _____ M., died without a will. That _____ will, as the Administrat _____ aforesaid well and truly administer the Goods, Chattels and Personal Estate, agreeably to law. That—will immediately publish for creditors once a week for six consecutive weeks; and render into the Register's Office, within thirty days from this date, a just and true inventory and appraisal of the personal estate of said deceased, and additional inventories when necessary. Also, a just and true account, calculation and reckoning of _____ said administration at the expiration of six months from this date, or when thereunto legally required. That _____ will well and truly comply with the provisions of the law relating to Collateral Inheritances. And also that _____ And also that the whole of the Goods, Chattels, Rights and Credits of the personal estate _____ died possessed of _____ in the aggregate do not in value exceed the sum of _____ Dollars to the best of _____ knowledge and belief.

_____ and subscribed before
me the day and year aforesaid, and letters of
administration granted unto _____

_____ Deputy Register

(Signatures)

12. PETITION FOR LETTERS OF ADMINISTRATION C. T. A. 358-9.

To _____, Esq., Register of Wills and ex-officio Clerk
of the Orphans' Court for the City and County of Philadelphia,
in the Commonwealth of Pennsylvania.

In the matter of the Probate of the last Will and Testament
of _____ Deceased,

The Petition of _____ respectfully sheweth that the Execut _____ named in the last Will and Testament of _____ a Citizen of United States dated the _____ day of _____ A. D. 1 _____ has _____ That the petitioner _____ the residuary, legatee and devisee named in the said Will. That said _____ the testat was a resident of the County of Philadelphia and State of Pennsylvania, and departed this life at number _____ in the County of _____ and State of _____ on _____ the _____ day of _____ A. D. 19—, at — o'clock — M.

The said testa was possessed of personal property to the value of \$ _____ and of real estate (less incumbrance) to the value of \$ _____ as near as can be ascertained, situated as follows: _____ Therefore the said _____ respectfully appl _____ for Probate of the said last Will and Testament _____ and for Letters of Administration *cum testamento annexo*.

Dated _____, A. D. 19—

Philadelphia County, ss:

_____ named in the above application, being duly _____ according to law, deposes and says that the matters and things set forth in the within Petition are true to the best of _____ knowledge and belief.

_____ and subscribed before me, at
Philadelphia, _____ A. D. 19—

_____ Deputy Register } (Signatures)

13. PETITION FOR LETTERS OF ADMINISTRATION D. B. N. C. T. A. 358, 360.

To _____, Esq., Register of Wills and ex-officio Clerk of the Orphans' Court for the City and County of Philadelphia, in the Commonwealth of Pennsylvania.

In the matter of granting Letters of Administration *de bonis non cum testamento annexo* on the Estate of _____ Deceased. Citizen of United States. PETITION.

The petition of _____ respectfully sheweth that _____ the Execut _____ of the last Will and Testament of _____ deceased, whose Will was admitted to Probate _____, having departed this life, and that the testat _____ left Goods, Chattels, Rights and Credits, etc., unad-

ministered by the said Execut ——— to the value of \$———
and Real Estate as to which power of sale was given to the
Executor to the value of \$———

Therefore, the said ——— respectfully appl———
for Letters of Administration *de bonis non cum testamento annexo*
upon the Goods, Chattels, Rights and Credits, etc., of which the
said ——— died possessed ———

Dated ——— A. D. 19——

Philadelphia County, ss:

(Residuary Legatee)

——— named in the above application, being duly———
according to law, deposes and says that the matter and things
set forth in the within Petition are true to the best of———
knowledge and belief.

——— and subscribed before me, at }
Philadelphia ——— A. D. 192—— }
——— Deputy Register } (Signatures)

14. BOND AND OATH OF ADMINISTRATOR C. T. A. 382-3.

Know all Men by these Presents, That we——— are
held and firmly bound unto the Commonwealth of Pennsylvania,
in the sum of ——— dollars, to be paid to the said Com-
monwealth: To which payment well and truly to be made, we
bind ourselves, jointly and severally, for and in the whole, our
heirs, executors and administrators, ——— and each and
every of them, firmly by these presents.

Sealed with our seals. Dated the ——— day of ———
in the year of our Lord One Thousand Nine Hundred and
——— (19——.)

The Condition of this Obligation is, That if the above bounden
——— Administrat ——— *cum testamento annexo*
of all and singular the Goods, Chattels, and Credits of———
deceased, do immediately publish for Creditors, &c., and make,
or cause to be made, a true and perfect inventory and inven-
tories according to law, of all and singular the Goods, Chattels,
and Credits of the said deceased, which shall have come, or shall
come, to the hands, possession or knowledge of the said Ad-
ministrat , as aforesaid, or unto the hands or possession of
any other person or persons for ——— and the same so made

to exhibit, or cause to be exhibited, in the *Register's Office*, in the County of Philadelphia, within thirty days from the date hereof, and the same Goods, Chattels, and Credits, and all other the Goods, Chattels, and Credits of the said deceased at the time of death, which at any time after shall come to the hands or possession of said Administrat _____ as aforesaid, or unto the hands or possession of any other person or persons for _____ do well and truly administer according to law. And further do make or cause to be made, a just and true account of _____ said Administration, at the expiration of six months of the date hereof, or when thereunto legally required. And all the rest and residue of the said Goods, Chattels, and Credits, together with the proceeds of any sales of real estate the said Administrat _____ may make under the will of decedent, which shall be found remaining upon said Administrat _____ account (the same being first examined and allowed by the Orphans' Court of the City and County of Philadelphia), shall deliver and pay unto such person or persons respectively as the said Orphans' Court, by their decree and sentence pursuant to the true intent and meaning of the last Will and Testament of the said deceased, and the law now in force in this Commonwealth, shall limit and appoint, and shall well and truly comply with the laws of this Commonwealth relating to Collateral Inheritances. And if it shall hereafter appear that any later Will and Testament was made by the said deceased, and the same shall be proved according to law, if the said Administrat _____ as aforesaid, being thereunto required, do surrender the said Letters of Administration in the *Register's Office* aforesaid, then this obligation is to be void—otherwise to be and remain in full force.

Signed, sealed and delivered in the presence of

(Signatures)

REGISTER'S OFFICE,

City and County of Philadelphia, ss:

_____ A. D. 19____. Then personally came the within named _____ and on _____ solemn _____ did depose, declare and say, That the within named decedent died on the _____ day of _____ A. D. 19 _____ at _____ o'clock and that _____ will as Administrat _____ aforesaid well and truly administer the said Estate, agreeably to the true intent and

meaning of the last Will and Testament of the said deceased in the law now in force in this Commonwealth. That _____ will immediately publish for creditors once a week, for six successive weeks, and render unto the Register's Office, within thirty days of this date, a just and true inventory and appraisement of the personal estate of said deceased, and additional inventories when necessary. Also a just and true account, calculation and reckoning of _____ said administration in six months from this date, or when thereunto legally required. That _____ will well and truly comply with the provisions of law relating to Collateral Inheritance. And also that _____ And also that the whole Estate _____ died possessed of does not in value exceed the sum of _____ Dollars to the best of _____ knowledge and belief.

_____ and subscribed before
the day and year aforesaid, and letters granted
unto _____ }
_____ Deputy Register } (Signatures)

15. INVENTORY AND APPRAISEMENT. 392.

City and County of Philadelphia, ss:

Personally came before me, Register of Wills, in and for the said City and County _____ who upon their solemn _____ did say that at the request of the _____ they _____ "well and truly and without prejudice or partiality, value and appraise the Goods and Chattels, Rights and Credits," which were of _____ deceased, "and in all respects perform their duties as appraisers to the best of their skill and judgment."

_____ and subscribed this _____

day of _____ 19—, before me

_____ Deputy Register

(Signatures)

Inventory and appraisement of the Goods and Chattels, Rights and Credits, which were of _____ late of Philadelphia, taken and made in conformity with the above deposition.

16. ADVERTISEMENT OF LETTERS. 391.

Estate of.....deceased.

Letters _____ on the above Estate having been granted to the undersigned, all persons indebted to the said

Estate are requested to make payment, and those having claims to present the same, without delay, to

Or to _____ Attorney

17. CERTIFICATE OF APPOINTMENT OF TRUSTEE WITH SECURITY. 584.

State of Pennsylvania, Philadelphia County, ss:

I certify, That at an Orphans' Court for the County aforesaid, held at Philadelphia, on the _____ day of _____ A. D. one thousand nine hundred and _____ before the Honorable _____, President, and his Associate Judges of said Court.

Sur-petition. The Court appointed _____ Trustee for _____ under the last will and testament of _____ on security being entered in the sum of _____ Dollars, which has been duly entered.

Witness my hand and seal of said Court, this _____ day of _____ A. D. 191____

_____Clerk of Orphans' Court.

_____Esq.

Attorney for Petitioner.

18. CERTIFICATE OF APPOINTMENT OF GUARDIAN WITHOUT SECURITY. 599.

State of Pennsylvania, Philadelphia County, ss:

I Certify, That at an Orphans' Court for the County aforesaid, held at Philadelphia, on the _____ day of _____ A. D. one thousand nine hundred and _____ before the Honorable _____, President, and his Associate Judges of said Court.

Sur-petition. The Court appointed _____ Guardian of _____ minor child of _____

Witness my hand and seal of said Court, this _____ day
of _____ A. D. 191_____

Asst. Clerk of Orphans' Court.

Esq.

Attorney for Petitioner.

19. CERTIFICATE OF APPOINTMENT OF GUARDIAN WITH SECURITY.

State of Pennsylvania, Philadelphia County, ss:

I Certify, That at an Orphans' Court for the County aforesaid, held at Philadelphia, on the _____ day of _____ A. D. one thousand nine hundred and _____ before the Honorable _____ President, and his Associate Judges of said Court.

Sur-petition. The Court appointed _____ Guardian of _____ minor child of _____ on security being entered in the sum of _____ Dollars, which has been duly entered _____

Witness my hand and seal of said Court, this _____ day
of _____ A. D. 191_____

Asst. Clerk of Orphans' Court.

Esq.

Attorney for Petitioner.

20. GUARDIAN'S INVENTORY. 606.

In the Orphans' Court of Philadelphia County.

Estate of _____ Minor. Inventory.

Commonwealth of Pennsylvania, City and County of Philadelphia, ss:

_____ being duly _____ says, that the above is a full, true and complete Inventory of the assets which have come into _____ hands as a Guardian of the Estate of the said minor .

_____ and subscribed before me
this _____ day of _____
A. D. 19_____

Clerk O. C.

21. BOND OF GUARDIAN OF MINOR'S ESTATE. 605.

Know all Men by these Presents, That we, ———— Are Held and Firmly Bound unto the Commonwealth of Pennsylvania, in the sum of ———— Dollars, lawful money, to be paid said Commonwealth of Pennsylvania, their certain Attorney or Assigns; to which payment, well and truly to be made, we bind ourselves and each of us, our Heirs, Executors and Administrators ———— jointly and severally, firmly by these presents. Sealed with our seals—dated the ———— day of ———— in the year of our Lord one thousand nine hundred and ————

Now, the Condition of this Obligation is such, That if the above-bounded ———— Guardian of ———— Minor Child of ———— shall, at least once in every three years, and whenever required by the Court, render a just and true account to the Orphans' Court of Philadelphia County, according to the directions of the Act of Assembly, in such case made and provided, of the management of the property and estate of the said minor under ———— care, and shall also deliver up the said property and estate, agreeably to the decree and order of said Court, or the directions of law, and shall in all respects faithfully perform the duties of Guardian, then the above Obligation shall be void and of no effect, or else to remain in full force and virtue.

Sealed and delivered in the presence of:

(Signatures)

—————(Seal)

22. BOND OF TRUSTEE APPOINTED. 388.

Estate of ————

Know all Men by these Presents, That We, ———— Are Held and Firmly Bound unto the Commonwealth of Pennsylvania, in the sum of ———— Dollars, lawful money, to be paid said Commonwealth of Pennsylvania, their certain Attorney or Assigns; to which payment, well and truly to be made, we bind ourselves and each of us, our Heirs, Executors and Administrators ———— jointly and severally, firmly by these presents. Sealed with our seals—dated the ———— day of ———— in the year of our Lord one thousand nine hundred and ————

Whereas, At an Orphans' Court for the County of Philadelphia, held the ———— day of ————, in the year of our Lord one thousand nine hundred and ————

Now, the Condition of the above Obligation is such, That if the above-bounden _____ shall faithfully execute said trust and truly account for the property and estate under _____ care and deliver up the same agreeably to the provisions of the Act of Assembly in such case made and provided, and according to the uses and trusts contained in the will of said decedent, then the said Obligation to be void, or otherwise to be and remain in full force and virtue.

Sealed and delivered in the presence of:

(Signatures)

_____(Seal)

23. BOND OF FIDUCIARY ON SALE OF REAL ESTATE. 192.

Estate of _____

Know all Men by these Presents, That We, _____ Are Held and Firmly Bound unto the Commonwealth of Pennsylvania in the sum of _____ Dollars, lawful money of the United States of America, to be paid to the said Commonwealth; to which payment, well and truly to be made, we bind ourselves, our Heirs, Executors, Administrators, _____ and every of them, jointly and severally, firmly by these presents. Sealed with our seals, and dated the _____ day of _____, in the year of our Lord one thousand nine hundred and _____

Whereas, At an Orphans' Court for the County of Philadelphia, held on the _____ day of _____ A. D. 192____, the Court _____ the above-bounded _____ of the Real Estate _____ in the proceedings particularly specified, upon security being entered in the above-mentioned sum:

Now, the Condition of the above Obligation is such, That if the above-bounden _____ as aforesaid shall faithfully execute the trust and properly appropriate _____ the proceeds of such _____ according to the trust and decree of the Court, and according to law, then this obligation to be void, or else to be and remain in full force and virtue.

Sealed and delivered in the presence of:

(Signatures)

_____(Seal)

24. BOND OF FIDUCIARY FOR MISCELLANEOUS TRANSACTIONS WHERE SECURITY IS REQUIRED. 388.

Estate of _____

Know all Men by these Presents, That We, _____ *Are Held and Firmly Bound unto the Commonwealth of Pennsylvania, in the sum of* _____ *Dollars, lawful money, to be paid said Commonwealth of Pennsylvania, their certain Attorney or Assigns; to which payment, well and truly to be made we bind ourselves and each of us, our Heirs, Executors and Administrators,* _____ *jointly and severally, firmly by these presents. Sealed with our seals—dated the* _____ *day of* _____ *in the year of our Lord one thousand nine hundred and* _____

Whereas, At an Orphans' Court for the County of Philadelphia, held the _____ *day of* _____ *in the year of our Lord one thousand nine hundred and* _____

Now, the Condition of the above Obligation is such, That if the above-bounden _____ *shall truly account for and faithfully appropriate the proceeds of the same, agreeably to the provisions of the Act of Assembly in such case made and provided, and according to the uses and trusts contained in the will of said decedent, then the said Obligation to be void, or otherwise to be and remain in full force and virtue.*

Sealed and delivered in the presence of:

(Signatures)

_____ (Seal)

25. BOND FOR COSTS ON APPEAL FROM ORPHANS' COURT. 163.

In the matter of Estate of _____ *No.* _____ *Term 191—*

Know all Men by these Presents, That We, _____ *are held and firmly bound unto the Commonwealth of Pennsylvania, in the sum of* _____ *Dollars, lawful money, to be paid said Commonwealth of Pennsylvania, its certain Attorney or Assigns; to which payment, well and truly to be made, we bind ourselves and each of us, our Heirs, Executors and Administrators* _____ *jointly and severally, firmly by these Presents.*

Sealed with our seals, and dated the _____ day of _____
in the year of our Lord one thousand nine hundred and _____

Whereas, _____ ha _____ appealed from the final decree
of the Orphans' Court for the County of Philadelphia, made
on the _____ day of _____ 191 _____

Now, the Condition of the above Obligation is such, That, if
the said _____ shall prosecute _____ appeal with
effect, and pay all costs and damages awarded by the Appellate
Court or legally chargeable against _____ then the above
Obligation to be void, or else to remain in full force and virtue.

Sealed and delivered in the
presence of:

(Signatures)

_____ (Seal)

26. JUSTIFICATION BY INDIVIDUAL SURETIES.

In the Orphans' Court of Philadelphia County.

Estate of _____ No. _____ Term, 19____ Security
ordered in \$ _____

_____ *Asst. Clerk O. C.*

_____ being duly _____ deposes and says:

I. That he resides at _____ and is by occupation _____

II. That he is the owner of _____ III. The deed of con-
veyance of which to him is recorded in the office for recording
deeds for said County in Deed Book _____

IV. That the title thereto is in his own name _____

V. That the incumbrances upon said premises are _____

VI. That the assessed value of said premises is _____

VII. That after payment of all _____ debts, engagements and liabilities, deponent

believes that _____ is worth not less than \$ _____

_____ and subscribed before me

this _____ day of _____

A. D. 19____

_____ *Asst. Clerk O. C.*

19____ The above security is approved.

27. CITATION. 116.

Philadelphia County, ss:

The Commonwealth of Pennsylvania To _____

Greeting: We Command You, _____ that, laying aside

all business and excuses whatsoever, you, _____ be and appear in your proper person before the Honorable the Judges of our Orphans' Court, at a Court to be held on Friday, the _____ day of _____ A. D. 192____, at 10 o'clock in the forenoon to show cause why _____ and further abide the order of the Court in the premises. And hereof fail not.

Witness the Honorable _____, President Judge of our said Court, at Philadelphia, the _____ day of _____ A. D. 192____

_____ *Assistant Clerk O. C.*

_____ *Esq.*

Attorney for Petitioner.

28. PETITION FOR DISTRIBUTION OF INTESTATE'S ESTATE. 552.

In the Orphans' Court of Philadelphia County, Estate of _____ deceased. The petition of _____ respectfully represents: (a) The decedent died _____, intestate and letters of administration on _____ estate were granted—

Decedent was _____

(State whether decedent was married or unmarried; if married, whether a husband or wife survive and his or her name, and whether the decedent left children or issue of deceased children.)

(b) The names of all persons having any interest as heirs or next of kin (with the names of their parents, to show relationship if necessary) are as follows:

| | | |
|---------------------------------------|--|----------------|
| Names _____ | Relationship _____ | Interest _____ |
| Of age or not (write yes or no) _____ | Name of Guardian or Committee, if any, and how appointed _____ | |

All of said parties in interest are living.

(State exceptions, if any, giving names and dates of death and the names of their executors or administrators, or the names of their issue as the same may be material.)

(c) All parties having any interest have had _____ notice of the filing of the account.

(Insert "actual," if such is the fact.)

(d) The estate is _____ subject to the payment of direct (collateral) inheritance tax to the State of Pennsylvania.

(If taxable, state whether tax has been paid.)

(e) All creditors (and other persons who have complied with Rule II, sec. 7), of whose claims the accountant has notice or knowledge, have received actual notice of this audit; the amounts of their claims and whether or not they are admitted to be correct are as follows: _____

(If too many for the space, annex a list thereof, if no such claims, insert the word "none.")

(If any creditor or other claimant has not received actual notice, that fact must be stated.)

(f)

(Here insert a reference to all questions requiring adjudication, and a statement of any material facts not already given. If none, insert the word "none." If any share has been assigned that fact should also be stated here.)

Wherefore your petitioner asks that distribution of principal and income be awarded to the persons thereunto entitled as set forth in paragraph (b) hereof.

And your petitioner will, etc.

County of Philadelphia, ss:

The above named petitioner being duly _____ doth depose and say that the facts set forth in the foregoing petition are true to the best of his knowledge and belief.

_____ to and subscribed before me this _____ day of _____ 192_____

29. PETITION FOR DISTRIBUTION UNDER A WILL. 552.

In the Orphans' Court of Philadelphia County. Estate of _____ deceased.

The petition of _____ respectfully represents:

(a) The decedent died _____, having made _____ last will duly probated _____, on which the present letters were granted _____, and leaving to survive _____.

(State whether a husband or wife survived and, if so, his or her name, and whether he or she has elected to take under or against the will according to section 23 of the Wills Act of 1917,

and if such an election has been made, state whether it has been filed and furnish a copy; state also whether or not the decedent left issue and their names, when material.)

(b) The names of all legatees and the amounts and character of their legacies (except such as have been revoked) and the names of the residuary legatees and the nature of their interests are as follows:

| | | |
|---------------------------------------|--|----------------|
| Names _____ | Relationship _____ | Interest _____ |
| Of age or not (write yes or no) _____ | Name of Guardian or Committee, if any, and how appointed _____ | |

All of said parties in interest are living.

(State exceptions, if any, giving names and dates of death and the names of their executors or administrators, or the names of their issue as the same may be material.)

(c) All parties having either vested or contingent interests have had notice of the filing of the account.

(Insert "actual" if such is the fact.)

(d) The decedent did _____ marry after the execution of the will and codicils (if any), and there were _____ children born to decedent thereafter.

(Insert "not" and "no" if such are the facts and names and dates of after born children, if any.)

(e) The estate is _____ subject to the payment of direct or collateral inheritance tax to the State of Pennsylvania.

(If taxable, state whether tax has been paid.)

(f) All creditors (and other persons who have complied with Rule II, sec. 7), of whose claims the accountant has _____ notice or knowledge, have received actual notice of this audit; the amounts of their claims and whether or not they are admitted to be correct are as follows: _____

(If too many for the space, annex a list thereof; if no such claims, insert the word "none." If any creditor or other claimant has not received actual notice, that fact must be stated.)

(g)

(Here insert or attach as an exhibit a copy of the parts of the will which require interpretation by the Court, if any; a reference to any questions requiring adjudication, and a statement of

any material facts not already given. If none, insert the word "none." If any share has been assigned, or attached, state the fact.)

Wherefore your petitioner asks that distribution be awarded to the persons thereunto entitled and suggests that the distributive shares of principal and income are as follows: (residuary shares being stated in proportions but not amounts.)

(If the distribution of income is different from that of principal, state the fact.)

And your petitioner will, etc.

County of Philadelphia, ss:

The above named petitioner being duly _____ doth depose and say that the facts set forth in the foregoing petition are true to the best of his knowledge and belief.

_____ to and subscribed before me this _____ day of _____, 192_____

30. PETITION FOR DISTRIBUTION OF A TRUST ESTATE. 552.

In the Orphans' Court of Philadelphia County. Estate of _____ deceased.

Sur trust for _____

The petition of _____ respectfully represents:

(a) The decedent died _____ having made his last will probated _____

The trust arises under the will as follows:

(Set forth a copy of that part of the will under which the trust arises, and a reference to any prior adjudication of the Court thereon.)

(b) The reason or purpose of the filing of the account is _____ and the names of all persons having any interest, vested or contingent, in the trust, with the nature of their interests, are as follows: _____

(If any are minors, state the fact and whether they have guardians, and how appointed.)

All of said parties in interest have received actual notice of this audit.

(State exceptions, if any.)

(c) The fund now before the court is _____ subject to the payment of collateral inheritance tax to the State of Pennsylvania.

(If taxable, state whether tax has been paid.)

(d)

(Here insert a reference to all questions requiring adjudication, and a statement of any material facts not already given. If none, insert the word "none." If any share has been assigned that fact should also be stated here.)

Wherefore your petitioner asks that distribution be awarded in the way and manner directed by the will and suggests that the balances of principal and income should be awarded respectively as follows: (awards being stated in proportions but not amounts.)

And your petitioner will, etc.

County of Philadelphia, ss:

The above named petitioner being duly _____ doth depose and say that the facts set forth in the foregoing petition are true to the best of h _____ knowledge and belief.

_____ to and subscribed before me this _____ day of _____, 192_____.

31. AFFIDAVIT OF DEATH TESTATE.

_____ Deceased.

State of Pennsylvania, Allegheny County, ss:

Personally came before me, _____ Register of Wills, etc., in and for said County _____ and upon _____ solemn oath did say, that _____ late of _____ died on the _____ day of _____ A. D. 19_____ at _____ M., to the best of _____ knowledge and belief, _____ testate.

Sworn and subscribed before me this _____ day of _____ A. D. 19_____

_____ Register.

(Signatures)

State of Pennsylvania, Allegheny County, ss:

I, _____, Register of Wills, etc., in and for the County aforesaid, do hereby certify the above to be a true copy of the affidavit of death in the Estate of _____ deceased, as the same is of record in Record of Deaths, Vol. _____ page _____

Witness my hand and seal of said office, this _____ day of _____ A. D. 19_____

_____ Register.

32. CITATION TO PRODUCE WILL. 267.

Commonwealth of Pennsylvania, Allegheny County, ss:

To _____, at the instance of _____ by h _____ Attorney,

You are hereby cited to be and appear before me, _____
Register for the Probate of Wills, granting Letters of Ad-
ministration, etc., in and for said County, on or before _____,
the _____ day of _____, 191____, at my office, at Pitts-
burgh, then and there to produce for probate the paper writing
alleged to be the last Will and Testament of _____, deceased.
and alleged to be in your possession or control.

Given under my hand and seal of office, at Pittsburgh, this
_____ day of _____ A. D. 191____

Register.

33. SUBPOENA TO WITNESS. 268.

Allegheny County, ss:

The Commonwealth of Pennsylvania, to Estate of _____
Deceased. In re _____

(Signatures)

Greeting:

We Command You, That, laying aside all business and ex-
cuses whatsoever, you, and each of you, be and appear in your
proper person before our Register of Wills at Pittsburgh, at
our Register of Wills' Office, in and for the County aforesaid
_____ to testify all and singular these things which you shall
know in the above entitled Estate now depending in our said
Register's Office, then and there to be tried, and herein fail not,
under the penalty of One Hundred Pounds.

Witness, My hand and seal of office at Pittsburgh, this _____
day of _____ A. D. 19____

Register of Wills.

**34. COMMISSION AND DEPOSITION OF WIT-
NESSES TO WILL. 269.**

State of Pennsylvania, Allegheny County, ss:

To _____ Esq., of _____

Greeting: You are hereby authorized and empowered to
cause to appear before you _____ the subscribing witnesses

to the instrument of writing hereto attached, purporting to be the last will and testament of _____ deceased, and on _____ oath or affirmation to propound to _____ the following interrogatories:

First. Are you a subscribing witness to this paper (exhibiting it), purporting to be the last will and testament of _____ deceased?

Second. Did you see the testat _____ sign _____ name at the end thereof?

Third. Did you hear _____ declare it to be _____ last will and testament?

Fourth. Do you believe at the time of so doing _____ was of sound mind and memory?

Fifth. Was it at _____ request and in _____ presence that you subscribed your name as a witness thereto?

And having so done, you are to reduce the answers of the said witness _____ to writing and certify the same under your hand and seal, and forward the same to the Register's office at Pittsburgh, Pennsylvania.

Given under my hand and seal of said office, at Pittsburgh, this _____ day of _____ A. D. 191_____

Register.

To _____ Esq., Register of Allegheny County, Pennsylvania:

Pursuant to the authority vested in me by your commission, to me directed, for the taking of testimony in the matter of the probate of a certain instrument of writing, purporting to be the last will and testament of _____, deceased, I, _____, do hereby certify that I caused _____ the witness in said commission named, to appear before me at _____, on _____ 191_____, and having exhibited to _____ the said instrument of writing, did propound to _____ the interrogatories annexed to said commission, to which the said witness _____ having been first duly sworn, made answer as follows:

_____ answers to the first interrogatory: _____ to the second interrogatory: _____; to the third interrogatory: _____; to the fourth interrogatory: _____; to the fifth interrogatory: (Witness sign here); _____ answers to the first interrogatory: _____; to the second interrogatory: _____; to the third interrogatory: _____; to the fourth

interrogatory: _____; to the fifth interrogatory: _____;
(Witness sign here.)

And I do further certify that the foregoing answers of the said witness _____ to the said interrogatories were by me reduced to writing in _____ presence and were by said witness signed before me the day and year aforesaid.

Witness my hand and seal this _____ day of _____ A.
D. 191_____

_____*Commissioner.*

Now, _____ A. D. 191_____, the testimony of the above named witnesses being sufficient, I do hereby admit the foregoing Will to Probate, and order the same to be recorded as such.

Given under my hand the above date.

_____*Register.*

35. PETITION FOR PROBATE AND LETTERS TESTAMENTARY. 358.

Application for Probate of Will of _____ late of _____ deceased, and Grant of Letters Testamentary.

Register's Office, Allegheny County, ss:

Before the Register of Allegheny County personally appeared _____ who, being sworn, say that _____ over twenty-one years of age and that _____ the executor appointed in the last will and testament of _____ deceased dated _____ That said testator, being at the time a resident of _____ Allegheny County, and a citizen of _____ died at _____ on _____ A. D. _____ at _____ M., possessed of personal estate to the value of \$_____ and of real estate (less encumbrances) to the value of \$_____ as nearly as can be ascertained, situate in _____

Act No. 25, of 1921, approved March 24, 1921, amends Clause (d) of Section 2, of the Act of June 7, 1917, P. L. 447 (the Fiduciaries Act), by adding thereto the following: "In the case of applications for letters testamentary, such applications shall set forth whether the testator has married and whether any children have been born to such testator since the execution of the will offered for probate."

That said testa has ——— married and ——— children
have been born to said testa since the execution of the will
offered for probate.

That deponent (whose P. O. address is ———) ——— resident
of Pennsylvania, and respectfully petition the Register to
admit said will to probate, and to grant letters testamentary
thereon to ———

| | |
|----------------------------------|--------------|
| Sworn and subscribed before me } | |
| —— A. D., 192—— | _____ |
| _____ Register. } | (Signatures) |

Allegheny County, ss:

I, ——— do swear that, as I verily believe, the above named
—— died on the ——— day of ——— A. D. ———
at ——— M.; and do further swear that as the executor of
the last will and testament of said decedent ——— will well
and truly administer the goods and chattels, rights and credits
of said decedent according to law, and also will diligently and
faithfully regard and well and truly comply with the provisions
of the law relating to inheritance tax.

| | |
|---------------------------------------|--------------|
| Sworn and subscribed before me this } | |
| —— day of ———, A. D. 192——, | _____ |
| and letters testamentary granted unto | |
| _____. | (Signatures) |
| _____ Register. } | |

36. OATH OF SUBSCRIBING WITNESSES TO WILL.

215.

State of Pennsylvania, Allegheny County, ss:

Be it known, That on the ——— day of ——— A. D.
19—— before me, ———, Register of Wills, etc., in
and for the County aforesaid, came ——— the subscribing
witnesses to the foregoing instrument of writing, purporting to
be ——— the last will and testament of ——— deceased,
and on their solemn oath did depose and say that they were
present and did see and hear ——— the testa therein
named, sign ——— seal, publish and declare the same as and
for ——— last Will and Testament, and at the time of so
doing ——— was of sound mind and memory, to the best of

_____ knowledge and belief, and at _____ request and in
_____ presence _____ subscribed _____ names as
witnesses hereunto _____

Sworn and subscribed before me }
the above date. } _____
_____ Register. } (Signatures)

Now, _____ A. D. 19____, the testimony of the above
named witnesses being sufficient, I do hereby admit the fore-
going will to probate, and order the same to be recorded as such

Given under my hand the above date.

_____ Register.

37. OATH TO DECEDENT'S SIGNATURE WHERE NO WITNESSES. 215.

State of Pennsylvania, Allegheny County, ss:

Be it Known, That on the _____ day of _____ A. D.
19____ before me, _____, Register of Wills, etc., in and
for the County aforesaid, came _____ and on _____
solemn oath did depose and say that he w well acquainted
with _____ the foregoing instrument of writing purporting
to be _____ the last Will and Testament of _____ and fami-
liar with _____ handwriting and signature, and that the sig-
nature of _____ to the said writing is in _____ own
proper handwriting, as _____ verily believe. _____

Sworn and subscribed before me }
the above date. } _____
_____ Register. }

Now, _____ A. D. 19____, the testimony of the above
named witnesses being sufficient, I do hereby admit the fore-
going Will to Probate, and order the same to be recorded as
such.

Given under my hand the above date.

_____ Register.

38. CITATION TO SHOW CAUSE WHY LETTERS SHOULD NOT ISSUE.

Allegheny County, ss:

Commonwealth of Pennsylvania.

To _____ at the instance of _____ by his Attorney _____

You are hereby cited to be and appear before me, _____,

Register of the Probate of Wills, granting Letters of Administration, &c., in and for said County, on or before _____ the _____ day of _____ 19____, at my office, at Pittsburgh, then and there to take out Letters of Administration on the estate of said _____ deceased, or show cause, if any, why said letters should not issue to said _____ or some other fit person.

Given under my hand and seal of office, at Pittsburgh, this _____ day of _____ A. D. 19____

Register.

39. RENUNCIATION OF RIGHT TO ADMINISTER.

357.

Estate of _____ Deceased.

The undersigned _____ and heirs of _____ late of _____ deceased, hereby renounce _____ right to administer on said estate and respectfully ask that Letters _____ be issued to _____

Signed in presence of :

(Signatures)

40. PETITION FOR LETTERS OF ADMINISTRATION. 358.

Application for Letters of Administration on the Estate of _____ late of _____ deceased.

Register's Office, Allegheny County, ss:

Before the Register of Allegheny County, personally appeared _____ who, being sworn, says that _____ being at the time a resident of _____ Allegheny County, and a citizen of _____ died intestate, at _____ on _____ A. D. _____ at _____ M., possessed of personal estate to the value of \$ _____ and of real estate (less encumbrances) to the value of \$ _____ as nearly as can be ascertained, situate in _____ That decedent's heirs and next of kin are as follows:

Relationship _____ Residence _____

That deponent, whose P. O. address is _____ is a citizen of the United States and a resident of Pennsylvania, and respectfully applies for Letters of Administration upon the Estate of said decedent.

Sworn and subscribed before me }
_____ A. D. 19____ }
_____ Register. } (Signatures)

Register's Office, Allegheny County, ss:

_____ 192____, before me, the Register, personally appeared _____ about to become a surety in the sum of \$_____ on the administration bond in the above entitled estate, who, being sworn, says that he resides at _____, Allegheny County, and is by occupation a _____; that he is the owner of real estate, the title to which is in his own name and duly recorded, situate in _____ Allegheny County, worth, above, encumbrances, \$_____ and upward; and that he is worth the amount expressed in said bond over and above his just debts and liabilities.

And on the same day there also personally appeared _____ likewise about to become a surety on said administration bond, who, being sworn, says that he resides at _____ Allegheny County, and is by occupation a _____; that he is the owner of real estate, the title to which is in his own name and duly recorded, situate in _____ Allegheny County, worth above incumbrances, \$_____ and upward, and that he is worth the amount expressed in said bond, over and above his just debts and liabilities.

| | | |
|---|---|-------|
| Sworn and subscribed before me the day and year aforesaid. | } | _____ |
| _____ Register. | | |

41. BOND AND OATH OF ADMINISTRATOR. 381-3.

Estate of _____ late of _____ deceased.

Know all Men by these Presents, That we _____ all of Allegheny County, Pennsylvania, are held and firmly bound unto the Commonwealth of Pennsylvania in the sum of _____ dollars, to be paid to the said Commonwealth, to which payment, well and truly to be made, we do bind ourselves, jointly and severally, for and in the whole, our heirs, executors and administrators _____ and each and every of them, firmly by these presents. Sealed with our seals and dated the _____ day of _____ A. D. one thousand nine hundred and _____

The Condition of this Obligation is, That if the above bounden _____ administrator of all and singular the goods, chattels and credits of _____ deceased, do make or cause to be made a true and perfect inventory of all and singular the goods, chattels

and credits of said deceased which have come or shall come to the hands, possession or knowledge of the said administrator or into the hands and possession of any other person or persons for said administrator and the same, so made, do exhibit, or cause to be exhibited, into the Register's Office, in the County of Allegheny, within thirty days from the date hereof: and the same goods, chattels and credits, and all other the goods, chattels and credits of the said deceased at the time of decedent's death, which at any time after shall come to the hands or possession of the said administrator or into the hands and possession of any other person or persons for said administrator do well and truly administer according to law; and further, do make or cause to be made a just and true account of said administration in one year from the date hereof, or when thereunto legally required, and all the rest and residue of the said goods, chattels and credits which shall be found remaining upon the said administrator's account, the same being first examined and allowed by the Orphans' Court of Allegheny County, shall deliver and pay unto such person or persons as the said Orphans' Court, by their decree or sentence pursuant to law, shall limit and appoint, and shall well and truly comply with the laws of this Commonwealth relating to collateral inheritance; and if it shall hereafter appear that any last Will and Testament was made by the said deceased, and the same shall be proved according to law, if the said administrator being thereunto required to surrender the said letters of administration into the Register's Office aforesaid, then this obligation to be void, otherwise to remain in full force.

Sealed and delivered in the presence
of _____.

(Signatures)

_____ (Seal)

Allegheny County, ss:

I, _____ being duly sworn, do say that _____ the above named decedent, died intestate on the _____ day of _____ A. D. 19____ at _____ M., as I verily believe. And I do further swear that, as the administrator of the estate of said decedent, I, _____ will well and truly administer the goods and chattels, rights and credits of said deceased, according to law, and

also will diligently and faithfully regard and well and truly comply with the provisions of the law relating to collateral inheritances.

Sworn and subscribed before me this }
 _____ day of _____ 19____ }
 and letters of administration granted } _____
 unto _____. }
 _____ Register. }

42. PETITION FOR LETTERS OF ADMINISTRATION C. T. A. 358-9.

In Re-Probate of the Will of _____ late of _____ deceased,
 and Grant Letters of Administration, *cum testamento annexo*.

Register's Office, Allegheny County, ss:

Before the Register of Allegheny County, personally appeared _____ who, being duly sworn, says that _____ being at the time a resident of _____, Allegheny County, and a citizen of _____, died at _____, on _____, A. D. _____, at _____ M., having first made _____ last will and testament, dated _____, wherein he appointed _____ executor, which executor has since _____.

That testator was possessed of personal estate to the value of \$_____, and of real estate (less encumbrances) to the value of \$_____, as nearly as can be ascertained, situate in _____

That testator's heirs and next of kin are as follows:

Relationship _____ Residence _____

That said testa has _____ married and _____ children have been born to said testa since the execution of the Will offered for probate.

That deponent, whose P. O. address is _____ is a resident of Pennsylvania, and respectfully petitions the Register to admit said will to probate, and to grant letters of administration *cum testamento annexo* on said estate to _____

Sworn and subscribed before me _____ }
 A. D. 192____ }
 _____ Register. }

Allegheny County, ss:

I, _____ do swear that, as I verily believe, the above named _____ died on the _____ day of _____ A. D. _____ at

———M.; and I do further swear that as the Administrator cum testamento annexo of the estate of the said decedent ——— will well and truly administer the goods and chattels, rights and credits of said deceased according to law, and also will diligently and faithfully regard and well and truly comply with the provisions of the law relating to inheritance tax.

| | | |
|--|---|--------------|
| Sworn and subscribed before me this | } | _____ |
| _____ day of _____ A. D. 192_____ | | |
| and letters of Administration cum testamento annexo granted unto _____ | | |
| _____Register. | | |
| | | (Signature.) |

43. OATH OF ADMINISTRATOR C. T. A. 382.

Allegheny County, ss:

I, _____ do swear that, as I verily believe, the above named _____ died on the _____ day of _____ A. D. — at _____ M.; and I do further swear that, as the administrator cum testamento annexo of the estate of the said decedent _____ will well and truly administer the goods and chattels, rights and credits of said deceased, according to law, and also will diligently and faithfully regard and well and truly comply with the provisions of the law relating to collateral inheritances.

| | | |
|--|---|--------------|
| Sworn and subscribed before me this | } | _____ |
| _____ day of _____ A. D. 19_____, and | | |
| letters of administration cum testamento annexo granted unto _____ | | |
| _____Register. | | |
| | | (Signature.) |

State of Pennsylvania, Allegheny County, ss:

I, William Conner, Register of Wills in and for said County, do hereby certify the foregoing to be a true and correct copy of the Affidavit of Death and of the Oath of office of the Administrator c. t. a. in the estate of _____ deceased, so full and entire as the same remain of record in my office; and that Letters of Administration c. t. a. on said estate were granted unto _____ on the _____ day of _____ A. D. _____

Given under my hand and seal of office, at Pittsburgh, this _____ day of _____ A. D. 19_____

_____Register.

44. BOND OF ADMINISTRATOR C. T. A. 383.

Know all Men by These Presents, That we ——— all of Allegheny County, Pennsylvania, are held and firmly bound unto the Commonwealth of Pennsylvania, in the sum of ——— Dollars, to be paid to the said Commonwealth, to which payment, well and truly to be made, we do bind ourselves, jointly and severally for and in the whole, our heirs, executors and administrators, and each and every of them, firmly by these presents. Sealed with our seals and dated the ——— day of ——— A. D. nineteen hundred and ———

The Condition of this Obligation is, That if the above bounden ——— administrator ——— cum testamento annexo of all and singular the goods, chattels and credits of ——— deceased, do make, or caused to be made, a true and perfect inventory of all and singular the goods, chattels and credits of said deceased, which have come or shall come to the hands, possession or knowledge of the said administrator or into the hands and possession of any other person or persons for said administrator, and the same so made do exhibit, or cause to be exhibited, into the Register's Office, in the County of Allegheny, within thirty days from the date hereof; and the same goods, chattels and credits, and all other goods, chattels and credits of the said deceased at the time of death, which at any time after shall come to the hands or possession of the Administrator or in the hands and possession of any other person or persons for said administrator, do well and truly administer according to law; and further, do make, or cause to be made, a just and true account of said administration, in six months from the date hereof, or when thereunto legally required, and all the rest and residue of the said goods, chattels and credits, together with the proceeds of any sales of real estate the said administrator may make under the will of decedent, which shall be found remaining upon the said administrator's account, the same being first examined and allowed by the Orphans' Court of Allegheny County, shall deliver and pay unto such person or persons as the said Orphans' Court, by their decree or sentence, pursuant to law, shall limit and appoint, and shall well and truly comply with the laws of this Commonwealth relating to inheritance tax; and if it shall hereafter appear that any Will and Testament was made by the said deceased, and the same shall be approved according to law, if the said adminis-

trator , being thereto required, do surrender the said letters of administration into the Register's Office aforesaid, then this obligation to be void, otherwise to remain in full force.

Sealed and delivered in the presence of :

(Signatures.)

Register's Office, Allegheny County, ss:

———19———, before the Register personally appeared ——, about to become a surety in the sum of ——, on the administration bond in the above-entitled estate, who, being sworn, says that he resides at ——, Allegheny County, and is by occupation a ——; that he is the owner of real estate, the title to which is in his own name and duly recorded, situate in —— County, worth, above incumbrances, \$—— and upward, and that he is worth the amount expressed in said bond over and above his just debts and liabilities.

And on the same day there also personally appeared ——, likewise about to become a surety on said administration bond, who, being sworn, says that he resides at ——, Allegheny County, and is by occupation a ——; that he is the owner of real estate, the title to which is in his own name and duly recorded, situate in ——, Allegheny County, worth, above incumbrances, \$—— and upward, and that he is worth the amount expressed in said bond over and above his just debts and liabilities.

Sworn and subscribed before me the day }
and year aforesaid.

—————Register. } (Signatures.)

45. BOND OF NON-RESIDENT EXECUTOR. 384.

Know all Men by these Presents, That we —— all of Allegheny County, Pennsylvania, are held and firmly bound unto the Commonwealth of Pennsylvania, in the sum of —— Dollars, to be paid to the said Commonwealth, to which payment well and truly to be made, we do bind ourselves, jointly and severally, for and in the whole, our heirs, executors and administrators, and each and every of them, firmly by these presents. Sealed with our seals, and dated the —— day of —— A. D. nineteen hundred and ——

The Condition of the Obligation is, That if the said ——— executor of the last will and testament of ——— deceased, shall make a true and perfect inventory of all and singular the goods, chattels and credits of the said deceased, being within this Commonwealth, which have come or shall come to his hands, possession or knowledge, or into the hands and possession of any person for him, and the same so made to exhibit into the office of the Register of the County of Allegheny within thirty days from the date hereof, and the same goods do well and truly administer according to law, and make a just and true account of all his actings and doings therein, in six months from the date hereof, or when thereunto lawfully required, and ——— shall well and truly comply with the laws of this Commonwealth relating to Collateral Inheritances and in all other respects with the laws of this Commonwealth relating to his duty as Executor, then this obligation to be void, otherwise of force and effect.

Sealed and delivered in the presence of:

————— (Seal)
 (Signatures.)

Register's Office, Allegheny County, ss:

———19———, before the Register personally appeared ———, about to become a surety in the sum of ———, on the administration bond in the above-entitled estate, who, being sworn, says that he resides at ———, Allegheny County, and is by occupation a ———; that he is the owner of real estate, the title to which is in his own name and duly recorded, situate in ——— County, worth, above incumbrances, \$——— and upward, and that he is worth the amount expressed in said bond over and above his just debts and liabilities.

And on the same day there also personally appeared ———, likewise about to become a surety on said administration bond, who, being sworn, says that he resides at ———, Allegheny County, and is by occupation a ———; that he is the owner of real estate, the title to which is in his own name and duly recorded, situate in ———, Allegheny County, worth, above incumbrances,

\$—— and upward, and that he is worth the amount expressed in said bond over and above his just debts and liabilities.

Sworn and subscribed before me the day }
and year aforesaid. }
_____ Register. } (Signatures.)

46. PETITON FOR PROBATE OF FOREIGN WILL. 266.

In Re Probate of the Authenticated Copy of the Will of ——
late of —— deceased,

Register's Office, Allegheny County, ss:

Before the Register of Allegheny County, personally appeared —— who, being duly sworn, says that —— being at the time a resident of —— County and citizen of —— died at —— on —— A. D. —— at —— M., having first made —— last will and testament, dated ——

That testator was possessed of personal estate to the value of \$——, and of real estate (less encumbrances) to the value of \$—— as nearly as can be ascertained, situate in ——

That testator's heirs and next of kin are as follows:

Relationship —— Residence ——

That deponent, whose P. O. address is —— is a resident of Pennsylvania, and respectfully petitions the Register to admit said will to probate.

Sworn and subscribed before me —— }
A. D., 19—— }
_____ Register. } (Signature.)

47. CERTIFICATE OF FILING FOREIGN WILL. 592.

State of Pennsylvania, Allegheny County, ss:

I, ——, Register of Wills, etc., in and for said County do hereby certify that pursuant to the provisions and requirements of an Act of Assembly, entitled, "An Act relating to Foreign Executors, Administrators, Guardians and Representatives of Decedents and Wards," approved April 8th, 1872 (P. L. 44), amended June 13, 1911, A. D. (P. L. 892); amended

June 7, 1917 (P. L. 525) ——— Executors of the last will and testament of ——— deceased filed in this office a duly authenticated copy of the last will and testament of the said ——— late of ——— deceased, together with affidavit of Executor required by Act of June 7, 1917, ———

Witness my hand and seal of said office, at Pittsburgh, Pa., this ——— day of ——— A. D. 19——

—————Register.

48. PETITION FOR ANCILLARY LETTERS OF ADMINISTRATION ON FOREIGN WILL. 592.

In Re Probate of the Authenticated Copy of the Will of——— late of ——— deceased and Grant of Letters of Administration, cum testamento annexo.

Register's Office, Allegheny County, ss:

Before the Register of Allegheny County personally appeared ——— who, being duly sworn, says that ——— being at the time a resident of ——— County and citizen of ——— died at ——— on ——— A. D. ——— at ——— M., having first made ——— last will and testament, dated ——— wherein he appointed ——— executor, which executor has since ———

That testator was possessed of personal estate to the value of \$——— and of real estate (less encumbrances) to the value of \$———, as nearly as can be ascertained, situate in ———

That testator's heirs and next of kin are as follows:

Relationship ——— Residence ———

That deponent, whose P. O. address is ——— is a resident of Pennsylvania, and respectfully petitions the Register to admit said authenticated will to probate, and to grant ancillary letters of administration cum testamento annexo on said estate to ———

Sworn and subscribed before me ——— }
A. D. 19—— }
—————Register. } (Signature.)

Allegheny County, ss:

I, ——— do swear that, as I verily believe, the above named ——— died on the ——— day of ——— A. D. ——— at ——— M., and I do further swear that, as the administrator cum testamento annexo, of the estate of the said decedent ——— will well and truly administer the goods and chattels, rights and

credits of said deceased, according to law, and also will diligently and faithfully regard and well and truly comply with the provisions of the law relating to inheritance tax.

Sworn and subscribed before me this
 _____ day of _____ A. D. 19____
 and ancillary letters of administration cum
 testamento annexo granted unto _____
 _____ *Register.* } (Signature.)

49. CERTIFICATE OF FILING FOREIGN LETTERS OF ADMINISTRATION. 592.

State of Pennsylvania, Allegheny County, ss:

I, _____, Register of Wills, etc., in and for said County do hereby certify that pursuant to the provisions and requirements of an Act of Assembly, entitled, "An Act relating to Foreign Executors, Administrators, Guardians and Representatives of Decedents and Wards," approved April 8th, 1872 (P. L. 44), amended June 13, 1911, A. D. (P. L. 892); amended June 7, 1917 (P. L. 525) _____ Administrator of the estate of _____ deceased, filed in this office a duly authenticated copy of letters of administration issued on the estate of said _____ late of _____ deceased, together with affidavit of Administrator required by Act of June 7, 1917 _____

Witness my hand and seal of said office, at Pittsburgh, Pa., this _____ day of _____ A. D. 19____

_____ *Register.*

50. APPEAL FROM THE REGISTER. 281.

State of Pennsylvania, Allegheny County, ss:

To the Register of Wills of Allegheny County.

Estate of _____ deceased.

The undersigned hereby appeals to the Orphans' Court of said County from the decision of the Register of Wills in the above estate, admitting to probate a certain paper writing, dated the _____ day of _____ 19____ as the last will and testament of said decedent, and granting letters testamentary thereon.

(Signature.)

_____ being duly sworn, doth depose and say that the above mentioned appeal is not intended for delay.

Sworn to and subscribed before me the
 _____ day of _____ A. D. 19____
 _____ Register. }

And now, _____ security in the above appeal is fixed in the sum of \$_____

_____ Register.

And now, _____ 19____ Bond of Appellant , with sureties in the sum of _____ Dollars, filed and approved.

_____ Register.

51. BOND OF CAVEATOR. 281.

Know All Men by these Presents, That we, _____ all of Allegheny County, Pennsylvania, are held and firmly bound unto the Commonwealth of Pennsylvania, in the sum of _____ Dollars, to be paid to the said Commonwealth, to which payment well and truly to be made, we do bind ourselves jointly and severally, for and in the whole, our heirs, executors and administrators, and each and every of them, firmly by these presents. Sealed with our seals, and dated the _____ day of _____ A. D. nineteen hundred and _____

Whereas, the said _____ on the _____ day of _____ A. D. 191____ filed in the office of the Register of Wills of Allegheny County, Pennsylvania, a Caveat against the admission to probate of any paper writing alleged to be the last Will and Testament of _____ deceased, or the granting of Letters _____ on the estate of _____ deceased, _____

Now the Condition of this Obligation is, That if the said Caveator shall pay any and all costs which may be occasioned by reason of such caveat, and which may be decreed by such Register of Wills, or by the Orphans' Court of Allegheny County, to be paid by such Caveator, then this obligation to be void, otherwise to remain in full force and virtue.

Sealed and delivered in the presence of:

_____ (Seal)

(Signatures.)

Register's Office, Allegheny County, ss:

_____ 191____, before the Register personally appeared _____ about to become a surety in the sum of _____ on the Caveator's

bond in the above-entitled estate, who, being sworn, says that he resides at _____ Allegheny County, and is by occupation a _____ that he is the owner of real estate, the title to which is in his own name and duly recorded, situate in _____ Allegheny County, worth, above incumbrances, \$_____ and upward, and that he is worth the amount expressed in said bond over and above his just debts and liabilities.

And on the same day there also personally appeared _____ likewise about to become a surety on said Caveator's bond, who, being sworn, says that he resides at _____ Allegheny County, and is by occupation a _____; that he is the owner of real estate, the title to which is in his own name and duly recorded, situate in _____ Allegheny County, worth, above incumbrances, \$_____ and upward, and that he is worth the amount expressed in said bond over and above his just debts and liabilities.

Sworn and subscribed before me the day }
and year aforesaid. } _____
_____—Register. } (Signatures.)

52. INVENTORY AND APPRAISEMENT. 392.

State of Pennsylvania, County of Allegheny, ss:

Personally came before me _____ in and for said County, the following named persons, viz: _____ who, being duly sworn, do depose and say that they, at the request of _____ will well and truly and without prejudice or partiality, value and appraise the goods and chattels, rights and credits, which were of _____ deceased and in all respects perform their duties as appraisers to the best of their skill and judgment.

Sworn and subscribed before me this
_____ day of _____ 19____

(Signatures.)

Inventory and Appraisement of the goods and chattels, rights and credits, which were of _____ late of _____ taken and made in conformity with the above deposition.

(Note.—*Appraisers should sign inventory at the end thereof.*)
_____ Dollars _____ Cents.

53. AFFIDAVIT OF NON-RESIDENT EXECUTOR AS TO DEBTS AND TRANSFER OF SECURITIES. 592.

In Re Estate of _____ Deceased.

State of _____ County of _____ ss:

Before me, the undersigned authority, a Notary Public, in and for the County and State aforesaid, personally appeared _____ who, being sworn according to law, deposes and says that he is the executor of the estate of _____ Deceased, late of _____ that the said decedent is not indebted to any person in the Commonwealth of Pennsylvania, and the proposed transfer, assignment, receipt or entry of satisfaction is not made for the purpose of removing any of the assets of said decedent beyond the reach of any of the creditors in the Commonwealth of Pennsylvania.

_____ (Seal)

(Signature.)

Sworn to and subscribed before me, the

_____ day of _____ A. D. 191_____

_____ Notary Public.

54. PETITION FOR DISTRIBUTION OF INTESTATE'S ESTATE. 552.

In the Orphans' Court of Allegheny County, State of Pennsylvania:

Estate of _____ Deceased.

The Statement of _____ respectfully represents:

(a) The decedent died _____ 192_____ intestate, and at that time was domiciled in _____ and resided in _____ and letters of administration on _____ estate (a copy being hereto attached marked Exhibit "A") were granted _____ 192_____ and on the _____ day of _____ 192_____ bond in the sum of \$_____ was approved.

Letters were advertised in the _____ and Pittsburgh Legal Journal, the last publication having been made on the _____ day of _____ and the _____ day of _____ 192_____ respectively, and proofs of publication marked Exhibit "B" are attached. An inventory, a copy of which is hereto attached and marked Exhibit "C" was filed on the _____ day of _____ 192_____

(If any additional assets have been received since filing the account state the amount and nature thereof, also interest on balances to date of first day of audit.)

(b) Exemption claimed by widow or children.

(c) All creditors of whose claims the accountant has notice or knowledge before filing the account, have received actual notice of the filing of the account; the amounts of these claims, together with those received since filing the account, and whether they are admitted to be correct are as follows:

Name _____ Amount _____

(Give preferred claims first and mark P. If claims too many for the space, annex a list thereof marked Exhibit "D;" if no such claims, insert the word "none." If any creditor or other claimant has not received actual notice, that must be stated. If proceeds of sale of land for payment of debts, attach List of Liens, marked Exhibit "E.")

(d) The estate is _____ subject to the payment of direct _____ collateral inheritance tax to the State of Pennsylvania, and is _____ subject to the payment of a Federal Inheritance Tax.

(If taxable, state whether tax has been paid.)

(e) Decedent was _____

(State whether decedent was married; if married, whether a husband or wife survived, and his or her name, and whether the marriage relationship was maintained, and whether the decedent left children or issue of deceased children and whether there has been any marriage settlement.)

(f) The names of all persons having any interest as heirs, or next of kin, including adopted children (with the names of their parents to show relationship if necessary), are as follows:

Names _____ Next of kin or heirs _____ Of age or not (write yes or no) _____ Name of guardian, trustee or committee, if any, and give reference to number and term of appointment _____ Amount of bond \$ _____

(g) All of said parties in interest are living.

(State exceptions, if any, giving names and dates of death, and the names of their executors or administrators, or the names of their issue, as the same may be material, and names of parties, if any, in the military service who would be adversely affected by a decree of distribution.)

(h) All parties, other than creditors, including the representatives of persons who are not sui juris, having any interest have had _____ notice of the filing of the account.

(Insert "actual," if such is the fact.)

(i) _____

(State appraised value of land set apart under Sec. 2-a of the Intestate Act of 1917, amended by Act of 1917, P. L. 755, if any.)

(j) _____

(Insert a reference to all questions requiring adjudication, and a statement of any material facts not already given. If none, insert the word "none." State if any advancement or settlement (see Sec. 22, Intestate Act), was made by decedent, or distribution by accountant, or if any share has been assigned or attached.)

(k) Kind of property to be distributed and elections to take in kind, if any.

(State the kind of property of which the balance consists; if not cash, state whether there has been an election to take in kind, and if so, attach copy marked Exhibit "F.")

(l) Contracts, assignments and other writings _____

(Attach original or certified copies of contracts, assignments, and other writings each separately marked as an Exhibit, beginning with "G.")

Wherefore, your accountant asks that distribution of the balance of principal and income be awarded to the persons thereunto entitled as set forth in paragraphs (c), (d), (f) and (g) hereof.

And your accountant will, etc.

Administrator or Administratrix.

(Signatures.)

55. PETITION FOR DISTRIBUTION UNDER A WILL. 552.

In the Orphans' Court of Allegheny County, State of Pennsylvania:

Estate of _____ Deceased.

The statement of _____ respectfully represents:

(a) The decedent died _____ 192_____ testate, and at that time was domiciled in _____ and resided in _____ and letters testamentary on his estate (a copy of same and the will and codicil being hereto attached marked Exhibit "A") were granted _____ 192_____ and on the _____ day of _____ 192_____ bond (if any) in the sum of \$_____ was approved.

Letters were advertised in the _____ and Pittsburgh Legal Journal, the last publication having been made on the _____ day of _____ and the _____ day of _____ 192_____ respectively, and proofs of publication marked Exhibit "B" are attached. An inventory, a copy being attached and marked Exhibit "C," was filed on the _____ day of _____ 192_____

(If any additional assets have been received since filing account state the amount and nature thereof, also interest on balances to date of first day of audit.)

(b) Exemption claimed by widow or children.

(c) All creditors of whose claims the account has notice or knowledge before filing the account, have received actual notice of the filing of the account; the amounts of these claims, together with those received since filing the account, and whether they are admitted to be correct are as follows:

Name _____ Amount _____

(Give preferred claims first and mark P. If claims too many for the space, annex a list thereof marked Exhibit "D;" if no such claims, insert the word "none." If any creditor or other claimant has not received actual notice, that fact must be stated. If proceeds of sale of land for payment of debts, attach List of Liens, marked Exhibit "E.")

(d) The estate is _____ subject to the payment of direct _____ collateral inheritance tax to the State of Pennsylvania, and is _____ subject to the payment of a Federal Inheritance Tax.

(If taxable, state whether tax has been paid.)

(e) Decedent was _____

(Did husband or wife survive? Has there been any marriage settlement? Was the family relation maintained? If there is an election comply with Sec. 23 of Wills Act of 1917, and attach copy marked Exhibit "F.")

(f) _____

(Were children born after date of will, or codicil if any? If so, give names and date of birth.)

(g) _____

(Is there intestacy as to any part of the estate? If so, give the facts.)

(h) The names of all persons having interest as legatees, heirs, next of kin, including adopted children, and devisees (with the

names of their parents to show relationship if necessary), are as follows:

Names ——— Legatees, next of kin, heirs or devisees ———
Of age or not (write yes or no) ——— Name of guardian,
trustee or committee, if any, and give reference to number and
term of appointment ——— Amount of bond \$———

(i) All of said parties in interest are living.

(State exceptions, if any, giving names and dates of death, and the names of their executors or administrators, or the names of their issue, as the same may be material, and names of parties, if any, in the military service who would be adversely affected by a decree of distribution.)

(j) All parties, other than creditors, including the representatives of persons who are not sui juris, having either a vested or contingent interest, have had ——— notice of the filing of the account.

(Insert "actual," if such is the fact.)

(k) ———

(Refer to any questions requiring adjudication and a statement of any material facts not already given. If none, insert the word "none.")

(l) Kind of property to be distributed and elections to take in kind if any.

(State the kind of property of which the balance consists. If it is not cash, state whether there has been an election to take in kind. If so, attach original or copy marked Ex. "G.")

(m) ———

(State if any distribution has been made and if any share has been assigned or attached. If advancements are charged in the will are they charged in the account. If there is partial intestacy, has any settlement been made? See Sec. 22, Intestate Act.)

(n) Contracts, assignments and other writings.

(Insert schedule of contracts, assignments and other writings, and attach originals of copies thereof certified by counsel and mark each as an Exhibit, beginning with "H.")

Wherefore, your accountant ask that distribution of the balance of principal and income be awarded to the persons thereunto entitled as set forth in paragraphs (c), (d), (h) and (i) hereof.

Executor or Executrix.

(Signatures.)

**56. PETITION FOR CITATION TO SHOW CAUSE
WHY AN INQUEST IN PARTITION SHOULD
NOT BE GRANTED. 4.**

In the Orphans' Court of Philadelphia County.

In Re Estate of William Doe, Deceased.

Petition for citation to show cause why an inquest in partition should not be granted for premises ——— street, Philadelphia.

To the Honorable, the Judges of the Said Court:

The petition of Catherine Doe, Mabel Doe and Ida Doe respectfully represents:

1. That William Doe died a resident of Philadelphia County, on the ——— day of ——— having first made, published and declared his last will and testament dated ——— a copy of which is annexed hereto, duly probated on ——— in the office of the Register of Wills of Philadelphia County, and recorded in Will Book No. ——— page ———

2. The said decedent died seized of (describe premises) being the same premises that ——— and wife by indenture bearing date the ——— day of ——— and recorded at Philadelphia, in Deed Book ——— at page ——— granted and conveyed unto the said William Doe, in fee, being known as premises ——— Street, Philadelphia.

3. After providing for a life estate to his wife, Mary Doe, the decedent directed that if the said premises ——— Street, in the City of Philadelphia, should be sold out of the proceeds thereof, Mary Jones should be paid \$100, and the residue should be divided equally among his sons, James Doe, William Doe, and his daughter, Kate Roe.

4. By proceedings in your Honorable Court a decree was entered on the ——— day of March ——— whereby an exemption of \$300 was charged on said premises in favor of Mary Doe, the widow. The said Mary Doe died a resident of Philadelphia County, on ———

5. Mary Jones intermarried with one Peter Poe, and is living and of full age and resides at ——— Street, Philadelphia.

6. James Doe died intestate, a resident of Philadelphia County, on the ——— day of ——— leaving to survive him a widow, Anna Doe, and one child, a daughter, Anna Smith, both living and of full age and residing at ——— Street, Philadelphia.

7. William Doe died on the _____ day of _____ intestate, leaving to survive him a widow, Catherine Doe, and two children, to wit: Mabel Doe and Ida Doe, all living and of full age and your petitioners herein and all residing in Philadelphia.

8. Kate Roe died a resident of Philadelphia County, on the _____ day of _____ intestate, leaving to survive her, no husband or issue and leaving as her present heirs and next of kin, Anna Smith, a daughter of James Doe, above set forth, and the widow and children of William Doe, above set forth.

Wherefore, title to the above premises is now vested as follows:

Anna Doe, three-eighteenths; Anna Smith, six-eighteenths, Catherine Doe, three-eighteenths; Mabel Doe, three-eighteenths; Ida Doe, three-eighteenths, so that your petitioners collectively are seized of one-half of the said premises, all subject, however, to the legacy of \$100, to Mary Jones.

That no partition or valuation of the said real estate has been had and your petitioners therefore pray your Honorable Court to grant a citation to the parties in interest to show cause why an inquest should not be awarded to make partition or valuation of the said real estate.

And your petitioners will ever pray, etc.

(Signatures.)

State of Pennsylvania, County of Philadelphia, ss:

Catherine Doe, Mabel Doe, and Ida Doe, being duly sworn according to law depose and say that they are the petitioners herein and that the facts set forth in the foregoing petition are true and correct to the best of their knowledge, information and belief.

Sworn to and subscribed before me this

_____ day of _____ 1921.

(Signature.)

In the Orphans' Court of Philadelphia County.

_____ Term, _____, No. _____.

In re Estate of William Doe, Deceased.

DECREE.

And Now, To wit, this _____ day of _____, 1921, upon consideration of the annexed petition and on motion of _____, attorneys for the petitioners, *it is hereby ordered and decreed*, that the prayer thereof be granted and that a citation be issued directed

to Anna Doe, Anna Smith and Mary Jones, to show cause why an inquest should not be awarded to make partition or valuation of premises (description), being known as ——— Street, Philadelphia.

Returnable sec. leg.

By the Court :

J.

57. PETITION FOR CITATION TO SHOW CAUSE WHY GUARDIAN AD LITEM SHOULD NOT BE APPOINTED. 116, 616.

In the Orphans' Court of Philadelphia County.

In re Estate of ———, Deceased.

——— Term, ———, No. ———.

To the Honorable, the Judges of the Said Court:

The petition of the ——— Trust Company respectfully represents :

1. That your petitioner is Trustee under the Will of ———, deceased, a copy of which is hereto annexed.

2. That your petitioner has filed its account in your Honorable Court for audit at which proceedings it is necessary that certain minors hereinafter set forth, interested contingently in remainder be represented by a guardian ad litem.

3. That ——— is a minor under the age of fourteen years, interested contingently in remainder ; that said minor is the son of ——— and ———, both of whom are living and reside at ———, the said ——— being a daughter of ———, who was a daughter of the above decedent.

4. That ——— is a minor over the age of fourteen years, interested contingently in remainder in the above estate ; that said minor is the daughter of ——— and ———, both of whom are living and both of whom reside in the City of ———, the said ———, formerly ———, being a daughter of the above decedent.

5. That the said minors and their parents have neglected and refused, though repeatedly requested so to do, to nominate any one as guardian ad litem for said minors or petitioned your Honorable Court for the appointment of such guardian.

Wherefore, your petitioner prays that a citation issue directed to the said ——— and ———, to show cause why the Court

should not appoint a guardian ad litem for their son, ———, under the age of fourteen years and to ——— and ——— and ———, a minor over the age of fourteen years to show cause why a guardian ad litem should not be appointed for the said minor for the purpose aforesaid, and it further prays that said citation may be served upon the said ——— and ——— by registered mail.

And your petitioner will ever pray, etc.

——— TRUST COMPANY.

By—————

State of Pennsylvania, County of Philadelphia, ss:

——— being duly sworn according to law, deposes and says that he is ——— of the corporation petitioner and that the facts set forth in the foregoing petition are true to the best of his knowledge, information and belief.

Sworn to and subscribed before me this

——— day of ———, 1921.

DECREE.

And Now, To wit, this ——— day of ———, 1921, upon consideration of the foregoing petition and on motion of ———, attorneys for the petitioner, *It is hereby ordered and decreed*, That the prayer thereof be granted and a citation is hereby directed to be issued to ——— and ———, to show cause why a guardian ad litem should not be appointed by the Orphans' Court of Philadelphia County to represent ———, their son, a minor under the age of fourteen years at the audit of the account of the ——— Trust Company, Trustee under the Will of ———, and to ——— and ———, to show cause why the Orphans' Court of Philadelphia County should not appoint a guardian ad litem to represent the said ———, a minor over the age of fourteen years at the audit of the account of the ——— Trust Company, Trustee under the Will of ———, and *it is further ordered and decreed*, That the said citation upon ——— and ———, may be served upon them by registered mail.

Returnable sec. leg.

By the Court:

J.

**58. PETITION UNDER THE REVISED PRICE ACT BY
EXECUTOR FOR LEAVE TO SELL REAL ES-
TATE AT PRIVATE SALE WHERE NO AU-
THORITY TO SELL IS GIVEN IN THE WILL.
183.**

In the Orphans' Court for the County of Philadelphia.

In re Estate of ———, Deceased.

——— Term, ———, No. ———.

Petition for Leave to Sell Real Estate.

To the Honorable, the Judges of the Said Court:

The petition of The ——— Company, ———, respectfully represents:

1. That it is sole executor under the will of ———, deceased, copy of which is annexed hereto. ——— and ———, the other executors named in said will, having predeceased the testator.

2. That the said ——— died on ——— day of ———, leaving a will duly probated by the Register of Wills of Philadelphia County, and letters testamentary were granted thereon to your petitioner as executor.

3. That the said ———, after certain bequests of sundry items of personal effects and cash legacies, devised and bequeathed the residue of his estate (insert here term of trust).

4. (Recite parties in interest.)

5. Among the assets of the said ——— is certain real estate, being premises ——— Avenue, in the City of Philadelphia, known and described as follows: (description).

being the same premises which ———, a single man, by indenture bearing date the ——— day of ———, and recorded at Philadelphia, in Deed Book ———, granted and conveyed unto the said ——— in fee.

6. That the said property has been sold by your petitioner, subject to the approval of your Honorable Court, to ——— for the price or sum of ———, in cash, of which ——— has been paid on account, and the balance is to be paid upon the execution and delivery of a deed for said premises.

7. That your petitioner has been advised by two disinterested real estate experts that the price or sum of \$———, is a full and fair price for said premises, and more than could be obtained

therefor at public sale. Affidavits to this effect are attached hereto and made part hereof as "Exhibit B" and "Exhibit C."

8. That the said property is assessed for taxation in the City of Philadelphia in the sum of \$——, as will appear by official certificate of the Board of Revision of Taxes annexed hereto as "Exhibit D."

9. Your petitioner and all the parties interested in said real estate in remainder or otherwise, consider it for the best interest of the said estate that the said premises shall be sold for the price or sum aforesaid.

10. Under the terms of the will of the said ——, your petitioner is given no authority to sell said real estate, wherefore it becomes necessary to apply to your Honorable Court for leave to make said sale.

11. All the parties interested in said real estate under the terms of said will, as hereinbefore recited, have agreed to said sale, and have agreed that it is for the best interest of the estate for your petitioner to make said sale, and have received actual notice of this petition, either in person or by guardian, and have joined in the prayer thereof.

Wherefore, your petitioner prays for leave and authority to sell and convey said premises above described to the said —— upon receipt of the balance of the purchase money to which your petitioner is entitled; said conveyance to vest title in said premises in the purchaser in fee simple free and discharged from all trusts, contingencies and remainders and indefeasible by any part or persons having a present or expectant interest therein in accordance with the provisions of the Act of Assembly in such case made and provided.

And your petitioner will ever pray, etc.

County of Philadelphia, ss:

——, being duly sworn according to law, deposes and says that he is —— of the Corporation petitioner, and that the facts set forth in the foregoing petition are true to the best of his knowledge, information and belief.

Sworn to and subscribed before me this
—— day of —— A. D. 1919.

JOINDER.

We, the undersigned, being all the parties having a present or expectant interest in the real estate designated in the foregoing petition and at large described therein, *do hereby certify* that we have had due notice of the intended presentation of the foregoing petition and do join in the prayer thereof.

(Signatures.)

EXHIBIT "B."

State of ———, County of ———, ss:

Personally appeared ———, who, being duly sworn according to law, deposes and says that he is a real estate expert of ——— years' experience; that during said period he has been engaged in actively carrying on his profession in the County of ———; that he is familiar with the values of real estate in the vicinity of the real estate referred to in the foregoing petition; that he has examined the premises therein described and as the result of said examination is of the opinion that the the sum of \$——, in cash represents the full market value of the said premises and is a greater price than could be obtained for the same at public sale, and that a sale thereof at the said price would be to the best interest and advantage of said estate; that he is not interested as broker, agent or otherwise in the said sale.

Sworn to and subscribed before me this
—— day of ———, 1921.

DECREE.

And Now, To wit, this ——— day of ———, the Court, on motion of ———, attorneys for the petitioner, and upon consideration of the foregoing petition, do grant the prayer thereof, and do authorize and empower The ——— Company ———, executor under the will of ———, deceased, to sell and convey: (description).

to ———, for the price or sum of \$——, and upon receipt of the balance of said purchase price, to wit: \$——, to make, execute and deliver a deed therefor to the said ——— in fee, free and discharged from all trusts and remainders and infeasible by any party or persons having a present or expectant

interest therein. Security to be entered in the sum of \$——, and the bond of The —— Company for —— is hereby approved as such security.

By the Court:

J.

**59. PETITION UNDER THE REVISED PRICE ACT
BY ANCILLARY EXECUTOR AND TRUSTEE
FOR LEAVE TO SELL REAL ESTATE AT PRIVATE
SALE WHEN THE TIME FIXED FOR
SALE IN THE WILL HAS NOT ARRIVED. 183.**

In the Orphans' Court of Chester County.

In the matter of the Estate of ——, Deceased.

—— Term, ——, No. ——.

Petition for Leave to Sell Real Estate at Private Sale.

To the Honorable, the Judges of the Said Court:

The petition of ——, Ancillary Executor and Trustee under the Will of ——, deceased, respectfully represents:

1. That your petitioner individually and as Executor and Trustee under the will of ——, deceased, is seized of title in (description of property).

being the same premises which ——, Executors and Trustees under the will of ——, et. al., by deed dated the —— day of ——, and recorded in Deed Book for Chester County, ——, page ——, conveyed to —— in fee, and the said —— afterwards intermarried with your petitioner and died on the —— day of ——, a resident of ——, having first made, published and declared her last will and testament dated the —— day of ——, a copy of which is annexed hereto as Exhibit "A," duly probated in the County of ——, on the —— day of ——, whereunder Letters Testamentary were duly issued to your petitioner, ——.

2. On the —— day of ——, ancillary Letters Testamentary were issued to your petitioner by the Register of Wills of Chester County.

3. In and by said will after sundry pecuniary bequests herein-after referred to testatrix provided: (recite provisions of will).

4. Of the said pecuniary legacies all of which are hereinafter set forth the following have been paid: \$——.

5. All of said parties in interest are living and of full age and have received notice of the intended presentation of this petition and have joined in the prayer thereof.

6. Your petitioner is the residuary legatee under the said will.

7. Your petitioner has received a very advantageous offer for the sale of the property hereinabove set forth and all parties in interest have requested that the sale be consummated, but owing to the restriction in the will that the property shall be held for a period of three years after the death of the testatrix, the power of sale given to your petitioner in the will is not yet operative and it is necessary that your petitioner apply to your Honorable Court for leave and authority to make the said sale.

8. Subject to the approval of your Honorable Court the premises described have been sold at private sale to —— for the price or sum of \$—— in cash.

9. Your petitioner is of the opinion that the price offered for the said real estate is full and fair and better than could be obtained for the same at public sale and that it would be for the best interest and advantage of the estate of ——, deceased, that the said sale be consummated in accordance with the terms hereinabove set forth because the price offered is better than could be obtained at public sale and that the sale may be made without injury or prejudice to any trust, charity or purpose for which the same is held and without the violation of any law which may confer an immunity or exemption from sale or alienation.

10. Your petitioner has been assured by two real estate experts experienced in the values of properties in the neighborhood of those hereinabove referred to that the price offered for the same is full and fair and the best that could be obtained at public sale. Their affidavits to this effect are hereto annexed as Exhibits "B" and "C."

11. That all parties interested in the said estate as hereinabove set forth, are satisfied that the price offered for the said premises is a full and fair one and better than could be obtained at public sale, and that the acceptance of the same will be for the best interests of the estate.

12. That the said premises are assessed for taxation in the sum of \$——, as appears by the official certificate hereto annexed marked Exhibit "D."

13. Your petitioner therefore prays your Honorable Court for leave and authority to sell and convey the premises herein described to the ——— for the price or sum of \$———, in cash; said conveyance to vest the title in the purchaser in fee simple, freed and discharged of all trusts, contingencies and remainders, and indefeasible by any party or persons having a present or expectant interest therein in accordance with the Act of Assembly in such case made and provided.

And your petitioner will ever pray, etc.

*Ancillary Executor and Trustee under
the will of ———, deceased.*

State of Pennsylvania, County of ———, ss:

——— being duly sworn according to law, deposes and says that he is the petitioner in the foregoing petition and that the facts set forth therein are true to the best of his knowledge, information and belief.

Sworn to and subscribed before me this
——— day of ———, 1921.

JOINDER.

We, the undersigned, being all the parties interested in the premises referred to in the foregoing petition, hereby acknowledge that we have received notice of the intended presentation of the foregoing petition and join in the prayer thereof.

(Signatures.)

(Exhibit "B" and "C." See Form 58 *supra*.)

DECREE.

And Now, to wit, this ——— day of ———, 1921, on consideration of the foregoing petition and affidavits thereto annexed, and on motion of ———, attorneys for the petitioner, it appearing that it would be to the best interest and advantage of the estate

of ———, deceased, that the premises described in the petition should be sold to ——— at private sale for the sum of \$———, in cash, and that the said price is better than can be obtained at public sale, and that the same may be done without injury or prejudice to any trust, charity or purpose for which the same is held and without the violation of any law which may confer an immunity or exemption from sale or alienation, *it is ordered and decreed* that the said sale be confirmed and that the said ———, Ancillary Executor and Trustee under the will of ———, deceased, is hereby authorized and empowered to convey the said premises, to wit: (description of property).

at private sale for the price of \$———, in cash, to ———, the title of the purchaser to be a fee simple title, indefeasible by any party or persons having a present or expectant interest in the said premises and unprejudiced by any error in the proceedings of the Court; security to be entered in the sum of \$———.

By the Court:

J.

**60. PETITION UNDER THE REVISED PRICE ACT
BY A CHURCH HOLDING PROPERTY IN TRUST
FOR LEAVE TO SELL THE SAME AT PRIVATE
SALE WHERE NO POWER OF SALE IS GIVEN
UNDER THE WILL. 183.**

In the Orphans' Court of Philadelphia County.

In re Estate of ———, Deceased.

——— Term, ———, No. ———.

Petition for Leave to Sell Real Estate at Private Sale.

To the Honorable, the Judges of the Said Court:

The petition of ——— Church, of Philadelphia, respectfully represents:

1. That by Deed Poll bearing date the ——— day of ———, and recorded at Philadelphia, in Sheriff's Book ———, page ———, Sheriff of Philadelphia County, granted and conveyed (here describe property).

now known as ——— Street, to ——— in fee.

2. That by Deed Poll bearing date the —— day of ——, and recorded at Philadelphia, in Sheriff's Book No. ——, page ——, Sheriff of Philadelphia County, granted and conveyed (description) :

now known as —— Street, to —— in fee.

3. The said —— being so seized of said premises died on the —— day of ——, having first made, published and declared his last Will and Testament dated ——, and Codicil thereto dated ——, copy of which is hereto annexed as Exhibit "A," both duly probated in the Office of the Register of Wills of Philadelphia County on the —— day of ——.

4. In and by the said Will the said —— provided (here recite term of trust under will) :

and your petitioner has held the premises hereinabove described for the uses and purposes of the said trust from the date of the death of the said decedent until the date hereof.

5. The houses erected on the said premises are very old and in a very dilapidated state of repair, so that in order to continue them in a tenantable condition, many hundreds of dollars would have to be spent to put them in good repair and out of its present funds your petitioner is unable to finance the said repairs and improvements.

6. Subject to the approval of your Honorable Court, premises —— Street, as hereinabove described, have been sold to ——, for the price or sum of \$——, in cash and premises —— Street, as hereinabove described, have been sold to —— for the price or sum of \$—— in cash.

7. The said sales were duly authorized under the Rules and practice of your petitioner at a special meeting of the Board of Trustees of your petitioner duly called and regularly held on the —— day of ——, and ratified and confirmed at a special meeting of the congregation of your petitioner duly called and regularly held on the —— day of ——.

8. Your petitioner is of the opinion that the prices offered for the said real estate are full and fair and better than could be obtained for the same at public sale and that it would be for the best interest and advantage of the trust under which said premises are held that the said sales be consummated in accordance with the terms hereinabove set forth because the prices offered are

better than could be obtained at public sale; that the sales may be made without injury or prejudice to any trust, charity or purpose for which the same are held and without the violation of any law which may confer an immunity or exemption from sale or alienation.

9. Your petitioner has been assured by two disinterested real estate experts experienced in the values of properties in the neighborhood of those hereinabove referred to that the prices offered for the same are full and fair and the best that could be obtained at public sale. Their affidavits to this effect are hereto annexed as Exhibits "B" and "C."

10. That the said premises are assessed for taxation in the sum of \$——, each as appears by the official certificate hereto annexed marked Exhibit "D."

11. Your petitioner has no power of sale under the terms of the will of the above decedent as hereinabove set forth, and therefore presents this petition to your Honorable Court to obtain its consent thereto under and by virtue of Section 2 (a) (5) of the Revised Price Act of 1917.

12. Your petitioner therefore prays your Honorable Court for leave and authority to sell and convey the premises herein described, to wit: —— Street, to ——, for the price or sum of \$——, in cash and premises —— Street, to —— for the price or sum of \$—— in cash; said conveyance to vest the title in the purchasers in fee simple freed and discharged of all trusts, contingencies and remainders, and indefeasible by any party or persons having a present or expectant interest therein in accordance with the Act of Assembly in such case made and provided.

And your petitioner will ever pray, &c.

—— Church,

By _____

President.

Attest:

Secretary.

State of Pennsylvania, County of Philadelphia, ss:

——— being duly sworn according to law, deposes and says that he is the President of the Board of Trustees of the —— Church, of Philadelphia, and that the facts set forth in the foregoing petition are true to the best of his knowledge, information and belief.

Sworn to and subscribed before me this
——— day of ——, 1920.

EXHIBIT B.

(See Form 58 *supra*.)

DECREE.

And Now, to wit: this —— day of ——, 1920, on consideration of the foregoing petition and affidavits thereto annexed and on motion of ——, attorneys for the petitioner, it appearing that it would be to the best interest and advantage of the estate of —— and of the trust under which the —— Church, of Philadelphia, holds title to the premises hereinafter described that the premises described in the petition, to wit: —— Street, should be sold to —— for \$—— in cash at private sale and —— Street, should be sold to ——, at private sale for the sum of \$—— in cash, and that the said prices are better than can be obtained at public sale and that the same may be done without injury or prejudice to any trust, charity or purpose for which the same are held and without the violation of any law which may confer an immunity or exemption from sale or alienation, *it is ordered and decreed* that the said sales be confirmed and that the said —— Church, of Philadelphia, is hereby authorized and empowered to convey the said premises, to wit: (here insert descriptions):

known as —— Street, to —— for \$—— in cash; the titles of the purchasers to be fee simple titles, indefeasible by any party or persons having a present or expectant interest in the said premises and unprejudiced by any error in the proceedings of the Court; security to be entered in the sum of \$——.

By the Court:

J.

**61. PETITION UNDER THE REVISED PRICE ACT
BY TRUSTEE FOR LEAVE TO SELL REAL ES-
TATE AT PRIVATE SALE WHERE THE TRUS-
TEE HAS NO POWER OF SALE UNDER THE
WILL. 183.**

In the Orphans' Court of Philadelphia County.

In re Estate of ———, Deceased.

——— Term, ———, No. ———.

To the Honorable, the Judges of the Said Court:

The petition of the ——— Trust Company, substituted trustee under the will of ———, deceased, respectfully represents:

1. ——— died ———, having first made, published and declared his last Will and Testament dated ———, duly probated in the Office of the Register of Wills of Philadelphia County, wherein and whereby the decedent appointed his sons, ——— and ——— executors and trustees, both of whom are now deceased.

A copy of the will is hereto annexed as Exhibit "A."

2. That by the adjudication of your Honorable Court dated ———, sur the account of the Executors of the said estate, the residue of the estate was awarded to ——— and ———, executors, in trust under the terms of the will.

3. That the said ——— died upwards of twenty years ago and that the said ———, the surviving executor and trustee died on the ——— day of ———, and your Honorable Court by decree dated the ——— day of ———, appointed the ——— Trust Company substituted trustee under the will of the said decedent.

4. That in addition to the personal estate awarded to said trustees under said adjudication, the deceased also possessed certain real estate in the City of Philadelphia, amounting in value to upwards of \$———.

5. Under his will, the decedent gave his executors the power to sell certain real estate in the City of Philadelphia, and specifically forbade that they sell any other including the premises herein described, until after the decease of his three daughters, to wit, ——— and ———, two of whom are still living.

6. By the terms of his will the decedent gave the residue of his estate to his executors in trust (recite terms of trust):

7. (Recite parties in interest and how acquired).

8. Among the assets of the residuary estate of the said decedent, title to which is now vested in your petitioner is (describe property by latest deed):

being known as premises ——— Street, in the City of Philadelphia, and being the same premises that ——— by Indenture bearing date the ——— day of ———, and now recorded at Philadelphia, in Deed Book ———, page ———, &c., granted and conveyed unto the said ——— in fee.

9. The said premises ——— Street, are in very poor condition. The roof, woodwork and interior all need general overhauling. The property is now rented at \$—— per month, or \$—— per year. The fixed charges, including taxes and water rent, amount to \$——, and the average cost of repairs is approximately \$—— annually, so that the net return averages \$—— per year, which is interest at 6 per cent. on \$——. If the proposed sale, however, herein referred to, is approved by your Honorable Court, approximately \$—— will be available to the estate on which the annual return will amount to \$——.

10. Subject to the approval of your Honorable Court, the premises above described have been sold at private sale to —— and ——, for the price or sum of \$——, \$—— in cash and \$—— secured by the bond and mortgage of the grantees in the usual form with interest at 6 per cent. per annum, payable at the expiration of three years from the date thereof or all in cash at the option of the purchasers.

11. Your petitioner is of the opinion that the price offered for the said real estate is full and fair and better than could be obtained for the same at public sale and that it would be for the best interest and advantage of the estate of ——, deceased, that the said sale be consummated in accordance with the terms hereinabove set forth, because the price offered is better than could be obtained at public sale, that the sale may be made without injury or prejudice to any trust, charity or purpose for which the same is held and without the violation of any law which may confer an immunity or exemption from sale or alienation.

12. Your petitioner has been assured by two disinterested real estate experts experienced in the values of properties in the neighborhood of those hereinabove referred to that the price offered for the same is full and fair and the best that could be obtained at public sale. Their affidavits to this effect are hereto annexed as Exhibits "B" and "C."

13. That all parties interested in the said estate as hereinabove set forth, are satisfied that the price offered for the said premises is a full and fair one and better than could be obtained at public sale, and that the acceptance of the same will be for the best interest of the estate. The said parties have received notice of the intended presentation of this petition and have joined in the prayer thereof.

14. That the said premises are assessed for taxation in the sum of \$——, as appears by the official certificate heerto annexed marked Exhibit "D."

15. Your petitioner has no power of sale under the terms of the will of the above decedent as hereinabove set forth and therefore presents this petition to your Honorable Court to obtain its consent thereto.

16. Your petitioner therefore prays your Honorable Court for leave and authority to sell and convey the premises herein described to —— and ——, for the price or sum of \$—— in cash and \$—— secured by the bond and mortgage of the grantees in the usual form with interest at 6 per cent. per annum, payable at the expiration of three years from the date thereof or all in cash at the option of the purchasers; said conveyance to vest the title in the purchaser in fee simple, freed and discharged of all trusts, contingencies and remainders, and indefeasible by any party or persons having a present or expectant interest therein in accordance with the Act of Assembly in such case made and provided.

And your petitioner will ever pray, etc.

The —— Trust Company.

By—————

State of Pennsylvania, County of Philadelphia, ss:

—— being duly sworn according to law, deposes and says that he is —— of the corporation petitioner and that the facts set forth in the foregoing petition are true to the best of his knowledge, information and belief.

Sworn to and subscribed before me this
—— day of ——, 1921.

JOINDER.

We, the undersigned, being all the parties interested in the premises referred to in the foregoing petition, acknowledge that we have received notice of the intended presentation of the foregoing petition and join in the prayer thereof.

EXHIBIT "B."

Commonwealth of Pennsylvania,
City and County of Philadelphia, ss:

Personally appeared ———, who, being duly sworn according to law, deposes and says that he is a real estate expert of ——— years' experience, now engaged in business at ———; that during said period he has been engaged in actively carrying on his profession in the County of Philadelphia; that he is familiar with the values of real estate in the vicinity of the real estate referred to in the foregoing petition; that he has examined the premises therein described and as the result of said examination is of the opinion that the sum of \$——, \$—— in cash and \$—— secured by the bond and mortgage of the grantees in the usual form with interest at 6 per cent. per annum, payable at the expiration of three years from the date thereof or all in cash at the option of the purchasers represents the full market value of the said premises and is a greater price than could be obtained for the same at public sale, and that a sale thereof at the said price would be to the best interest and advantage of said estate.

Sworn to and subscribed before me this
—— day of ———, 1921.

DECREE.

And Now, to wit: this ——— day of ———, 1921, upon consideration of the annexed petition and affidavits thereto attached and on motion of ———, attorneys for the petitioner, it appearing that it would be to the best interest and advantage of the estate of ——— that the premises described in the petition should be sold to ——— and ———, at private sale, for the sum of \$——, \$—— in cash and \$—— secured by the bond and mortgage of the grantees in the usual form with interest at 6 per cent. per annum, payable at the expiration of three years from the date thereof or all in cash at the option of the purchasers and

that the said price is better than can be obtained at public sale and that the same may be done without injury or prejudice to any trust, charity or purpose for which the same is held and without the violation of any law which may confer an immunity or exemption from sale or alienation, *It is ordered and decreed* that the said sale be confirmed and that the said ——— Trust Company, substituted trustee under the will of ———, deceased, is hereby authorized and empowered to convey the said premises, to wit: (description of property):

being known as premises ——— Street, Philadelphia, to ——— and ———, for the price of \$——, \$—— in cash and \$—— secured by the bond and mortgage of the grantees in the usual form with interest at 6 per cent. per annum payable at the expiration of three years from the date thereof or all in cash, at the option of the purchasers; the title of the purchasers to be a fee simple title, indefeasible by any party or persons having a present or expectant interest in the said premises and unprejudiced by any error in the proceedings of the Court; security to be entered in the sum of \$——, and the bond of the ——— Trust Company is hereby approved as such security.

By the Court:

**62. PETITION UNDER THE REVISED PRICE ACT
BY TRUSTEE FOR LEAVE TO JOIN WITH
OTHERS IN THE PRIVATE SALE OF REAL
ESTATE WHERE THERE IS NO POWER OF
SALE IN THE WILL. 183.**

In the Orphans' Court of Philadelphia County.

In re Estate of ———, Deceased.

——— Term, ———, No. ———.

Petition for Leave to Join in the Sale of Real Estate at Private
Sale.

To the Honorable, the Judges of the Said Court:

The petition of The ——— Company, ———, Trustee of the Estate of ———, deceased, respectfully represents:

1. That ——— died ———, a resident of Philadelphia County, seized of title to (description):

being known as Nos. ——— Street, and Nos. ——— Avenue, being the ——— corner of ——— Street and ——— Avenue, Philadelphia.

2. The will of the said decedent dated ———, was duly probated on the ——— day of ———, and Letters Testamentary were duly granted to ———, one of the Executors named therein. Copy of said will is hereto annexed marked Exhibit "A."

3. By his will the decedent provided inter alia as follows: (recite provisions of will):

4. In an adjudication by Judge ———, of the Orphans' Court of Philadelphia County, sur account of ———, Trustee, wherein the fund before the Court represented rents from real estate and the award of a jury of view for damages caused to the decedent's real estate by the change of grade of ——— Street, the Court held: * * *

5. In a later adjudication before ——— Judge ———, sur the account of The ——— Company ———, Trustee, wherein the fund accounted for represented a balance in the hands of the accountant from the sale of certain real estate, the Court held:

* * *

6. The said ——— was discharged as Trustee of the estate on ———, and on ———, The ——— Company ———, was appointed Trustee of the said estate in his place and stead and holds title as Trustee for an undivided four-ninths for the benefit of the widow for life.

7. — * * *

8. (Recite parties in interest.)

9. Title to the said real estate is therefore vested as follows: four-ninths in The ——— Company ———, Trustee under the will of ———, deceased, for the life of the widow; one-ninth in ———; one-ninth in ———; one-ninth in ———; one-ninth in The ——— Company ———, Guardian of the Estates of ———, subject to the life interest of ———; one-ninth in ——— guardian of the estates of ——— and ———, minors, subject to the life interest of ———.

10. The said children and issue of deceased children are also vested with the remainder interest in the four-ninths held in trust as aforesaid for the life of the widow.

11. The premises hereinabove described are vacant lots from which no income can be derived, but which, on the other hand,

on account of taxes are a constant drain upon the estate for the payment of which no income is available.

12. Subject to the approval of your Honorable Court the premises above described have been sold at private sale to —— for the price or sum of \$—— in cash.

13. Your petitioner is of the opinion that the price offered for the said real estate is full and fair and better than could be obtained for the same at public sale and that it would be for the best interest and advantage of their estate and all parties in interest that the said sale be consummated in accordance with the terms hereinabove set forth because the price offered is better than could be obtained at public sale and because it would be necessary to have partition proceedings to separate the ownership of the various persons interested and by making the sale to the said purchaser, the expense and delay of partition proceedings can be avoided, and that it is not likely that the property will increase in value within the time necessary for the partition proceedings, that the sale may be made without injury or prejudice to any trust, charity or purpose for which the same is held and without the violation of any law which may confer an immunity or exemption from sale or alienation.

14. Your petitioner has been assured by two disinterested real estate experts experienced in the values of properties in the neighborhood of those hereinabove referred to, that the price offered for the same is full and fair and the best that could be obtained at public sale. Their affidavits to this effect are hereto annexed as Exhibits "B" and "C."

15. That all parties interested in the said estate as hereinabove set forth are satisfied that the price offered for the said premises is a full and fair one and better than could be obtained at public sale, and that the acceptance of the same will be for the best interests of the estate. The said parties have received notice of the intended presentation of this petition and have joined in the prayer thereof.

16. That the said premises are assessed for taxation in the sum of \$——, as appears by the official certificate hereto annexed marked Exhibit "D."

17. Your petitioner has no power of sale under the terms of the will of the above decedent as hereinabove set forth, and therefore presents this petition to your Honorable Court to obtain its consent thereto.

18. Your petitioner therefore prays your Honorable Court for leave and authority to join with the other parties in interest in the sale and conveyance of the premises herein described upon receipt of the proportionate part of the purchase price to which it is entitled to the said ——— for the price or sum of \$——— in cash; said conveyance to vest the title in the purchaser in fee simple, freed and discharged of all trusts, contingencies and remainders, and indefeasible by any party or persons having a present or expectant interest therein in accordance with the Act of Assembly in such case made and provided.

And your petitioner will ever pray, etc.

By—————

Trustee of the Estate of ———, Deceased.

State of Pennsylvania, County of Philadelphia, ss:

——— being duly sworn according to law, deposes and says that he is ——— of the corporation petitioner and that the facts set forth in the foregoing petition are true to the best of his knowledge, information and belief.

Sworn to and subscribed before me this

——— day of ———, 1921.

JOINDER.

We, the undersigned, being all the parties interested in the premises referred to in the foregoing petition, hereby acknowledge that we have received notice of the intended presentation of the foregoing petition and join in the prayer thereof.

EXHIBIT "B" AND "C."

(See Form 58 *supra*.)

In the Orphans' Court of Philadelphia County.

In re Estate of ———, Deceased.

——— Term, ———, No. ———.

DÉCRÉE.

And Now, to wit, this ——— day of ———, 1921, on consideration of the annexed petition and affidavits thereto annexed and on motion of ———, attorneys for the petitioner, it appearing that it would be to the best interest and advantage of the estate of ———, deceased, that the premises described in the petition should be sold to ———, at private sale for the sum of

\$—— in cash, and that the said price is better than can be obtained at public sale, and that the same may be done without injury or prejudice to any trust, charity or purpose for which the same is held and without the violation of any law which may confer an immunity or exemption from sale or alienation, *it is ordered and decreed* that the said sale be confirmed and that the said The —— Company ——, substituted Trustee under the will of ——, deceased, is hereby authorized and empowered to join in the sale and conveyance of the said premises, to wit: (description):

being known as Nos. —— Street, and —— Avenue, being the —— corner of —— Street and —— Avenue, Philadelphia, to ——, at private sale for the price of \$—— in cash, upon receipt of the proportionate part of the purchase price to which it is entitled; the title of the purchaser to be a fee simple title, indefeasible by any party or persons having a present or expectant interest in the said premises and unprejudiced by any error in the proceedings of the Court; security to be entered in the sum of \$——, and the bond of the said The —— Company ——, is hereby approved as such security.

By the Court:

(Note: In Philadelphia County it is now required that the decree be the first page of the petition. This form of decree is adapted for that purpose.)

**63. PETITION UNDER THE REVISED PRICE ACT
BY GUARDIAN FOR LEAVE TO SELL REAL
ESTATE AT PRIVATE SALE WHERE THE
PREMISES ARE IN BAD REPAIR AND THE
SALE WILL INCREASE THE INCOME FOR THE
MINOR. 183.**

In the Orphans' Court of Philadelphia County.

In re Estate of ——, a minor.

—— Term, ——, No. ——.

Petition for Leave to Sell Real Estate at Private Sale.

To the Honorable, the Judges of the Said Court:

The petition of ——, Guardian of the estate of ——, a minor, respectfully represents:

1. That ——— and wife by indenture bearing date the ——— day of ———, and recorded at Philadelphia, in the Office for Recording of Deeds in and for the City and County of Philadelphia, in Deed Book ———, page ———, &c., granted and conveyed (description of property) :

known as premises ——— Street, Philadelphia, to ——— in fee under and subject to certain building restrictions and also under and subject to the payment of a certain first mortgage of \$——— and a second mortgage of \$———.

2. That the said ———, being seized of said premises died on the ——— day of ———, 1914, intestate, leaving to survive him his wife, ———, and his daughter, ——— a minor, as his only heirs and next of kin whereby title to the said premises became vested in the said minor, subject to the life interest of the said ——— in one-third thereof.

3. That the said ——— has remised and released to the said minor all her interest in said real estate so that the entire title to the same is now vested in said minor.

4. That ——— was appointed guardian of the estate of the above minor by decree of the Orphans' Court of Montgomery County, dated ———.

5. The improvements on the said premises consist of a two-story brick dwelling without modern improvements which, up to several months ago, had been rented for \$——— per month. That the said premises were vacant for several months, but are now occupied by a proposed purchaser pending the approval of this agreement, with the understanding that he shall pay the fixed charges thereon. The premises are assessed for \$———. In order to keep them in tenantable condition, it is estimated that approximately \$——— per annum would have to be spent for repairs. Taxes and water rent aggregate \$——— per year and interest on the first mortgage at 6 per cent. \$——— per year, leaving a net return of \$———, which represents the interest on an equity of approximately \$———.

6. On ——— paid the said second mortgage on the said premises which with the debt, interest and satisfaction fee, then amounted to the sum of \$———, which amount with interest thereon from the said date she claims to have repaid to her out of the proceeds of the sale of said property herein prayed for.

7. Subject to the approval of your Honorable Court, the premises above described have been sold at private sale to ——— for

the price or sum of \$—— in cash, that is, \$—— in cash subject to a first mortgage of \$——.

8. Your petitioner is of the opinion that the price offered for the said real estate is full and fair and better than could be obtained for the same at public sale and that it would be for the best interest and advantage of the estate of —— that the said be consummated in accordance with the terms hereinabove set forth; that the sale may be made without injury or prejudice to any trust, charity or purpose for which the same is held and without the violation of any law which may confer an immunity or exemption from sale or alienation.

9. Your petitioner has been assured by two disinterested real estate experts, experienced in the values of properties in the neighborhood of those hereinabove referred to that the price offered for the same is full and fair and the best that could be obtained at public sale. Their affidavits to this effect are hereto annexed as Exhibits "A" and "B."

10. That all parties interested in the said estate as hereinabove set forth, are satisfied that the price offered for the said premises is a full and fair one and better than could be obtained at public sale, and that the acceptance of the same will be for the best interests of the estate. The said parties have received notice of the intended presentation of this petition and have joined in the prayer thereof.

11. That the said premises are assessed for taxation in the sum of \$——, as appears by the official certificate hereto annexed, marked Exhibit "C."

12. Your petitioner therefore prays your Honorable Court for leave and authority to convey the said premises for \$—— in cash, over and above a first mortgage of \$——, to ——, free, clear and discharged of all trusts, claims and demands, the title of the purchaser to be in fee simple, indefeasible by any party or persons having a present or expectant interest in the premises and the purchase money to be in all respects substituted for the land sold and to be applied to the uses of the same persons for the same estate and the same interests that it is now held.

And your petitioner will ever pray, &c.

Guardian of the Estate of ——, a minor.

State of ———, County of ———, ss:

———, being duly sworn according to law, deposes and says that he is the petitioner herein and that the facts set forth in the foregoing petition are true to the best of his knowledge, information and belief.

Sworn to and subscribed before me this
——— day of ———, 1921.

JOINDER.

We, the undersigned, being all the parties interested in the estate of ———, a minor, hereby acknowledge that we have received notice of the intended presentation of the foregoing petition and join in the prayer thereof.

In the Orphans' Court of Philadelphia County.

In re Estate of ———, a minor.
——— Term, ———, No. ———.

DECREE.

And Now, to wit, this ——— day of ———, 1921, on consideration of the annexed petition and the affidavits thereto attached and on motion of ———, attorneys for the petitioner, it appearing that it would be to the best interest and advantage of the estate of ———, a minor and all parties interested therein, that the premises described in the petition should be sold to ———, at private sale for the price or sum of \$——— in cash, under and subject to a first mortgage of \$———; that the said price is better than can be obtained at public sale and that the same may be done without injury or prejudice to any trust, charity or purpose for which the same is held and without the violation of any law which may confer an immunity or exemption from sale or alienation, *It is ordered and decreed* that the said ———, Guardian of the estate of ———, a minor, is hereby authorized and directed to convey the said premises to the said ———, upon receipt of the said purchase price of \$———, subject to the necessary adjustment at the time of settlement of taxes and water rent among the persons entitled thereto and to the repayment to ——— of the sum of \$———, with interest

thereon from ———, the title of the purchaser to be a fee simple title, subject to certain building restrictions and subject to the said first mortgage of \$———, indefeasible by any party or persons having a present or expectant interest in the said premises and unprejudiced by any error in the proceedings of the Court; security to be entered in the sum of \$———.

By the Court :

J.

**64. PETITION UNDER THE REVISED PRICE ACT
BY GUARDIAN FOR LEAVE TO JOIN WITH
OTHERS IN THE PRIVATE SALE OF REAL
ESTATE TO AVOID PARTITION. 183.**

In the Orphans' Court of Philadelphia County.

In the matter of the Estate of ———, a minor.

——— Term, ———, No. ———.

Petition for Leave to Join in the Sale of Real Estate at Private Sale.

To the Honorable, the Judges of the Said Court:

The petition of The ——— Company ———, Guardian of the Estate of ———, a minor, respectfully represents :

1. ——— by indenture bearing date the ——— day of ———, and recorded in the office for recording of deeds in and for the City and County of Philadelphia, in deed book ———, etc., granted and conveyed unto ———, (insert description) : being known as premises ——— Street, Philadelphia.

2. ——— being so seized of said premises died on the ——— day of ———, intestate, leaving to survive her, her husband, ——— and her daughter, ———, as her only heirs so that title to said premises is now vested in the said ———, and the said ———, each an undivided one-half share.

3. Your petitioner was duly appointed guardian of the estate of the said minor ———, by decree of your Honorable Court, dated ———.

4. ——— is living and of full age.

5. Subject to the approval of your Honorable Court the prem-

ises above described have been sold at private sale to ———, for the price or sum of \$——— in cash.

6. Said premises consist of a lot — feet — inches by — feet, on the northeast corner of ——— and ——— Streets, Philadelphia, on which is erected a three-story brick dwelling, built about fifty years ago, containing twelve rooms and no modern improvements. The property is in rather poor condition and is now vacant. If placed in good condition with modern improvements, it would probably rent for approximately \$——— per month, but your petitioner is without funds in the estate of the said minor to provide the said improvements and it is the desire of your petitioner and the said ———, the only other party in interest, to sell the said premises and invest the proceeds so that an income will be available for the benefit of the said minor, rather than continue it in its present condition, whereby a very small rent could be obtained as against heavy fixed charges with a consequent loss to the estate of the said minor.

7. Your petitioner therefore is of the opinion that the price offered for the said real estate is full and fair and better than could be obtained for the same at public sale and that it would be for the best interest and advantage of the estate of the said minor, ———, that the said sale be consummated in accordance with the terms hereinabove set forth because the price offered is better than could be obtained at public sale and because it would be necessary to have partition proceedings to separate the ownership of the various persons interested and by making the sale to the said purchaser, the expense and delay of partition proceedings can be avoided, and that it is not likely that the property will increase in value within the time necessary for the partition proceedings, that the sale may be made without injury or prejudice to any trust, charity or purpose for which the same is held and without the violation of any law which may confer an immunity or exemption from sale or alienation.

8. Your petitioner has been assured by two disinterested real estate experts experienced in the values of properties in the neighborhood of those hereinabove referred to that the price offered for the same is full and fair and the best that could be obtained at public sale. Their affidavits to this effect are hereto annexed as Exhibits "A" and "B."

9. That all parties interested in the said estate as hereinabove set forth, are satisfied that the price offered for the said prem-

ises is a full and fair one and beter than could be obtained at public sale and that the acceptance of the same will be for the best interests of the estate. The said parties have received notice of the intended presentation of this petition and have joined in the prayer thereof.

10. That the said premises are assessed for taxation in the sum of \$——, as appears by the official certificate hereto annexed marked Exhibit "C."

11. Your petitioner has no power of sale and therefore presents this petition to your Honorable Court to obtain its consent thereto.

12. Your petitioner therefore prays your Honorable Court for leave and authority to join in the sale and conveynce of the premises herein described to the said ——, for the price or sum of \$——, in cash; said conveyance to vest the title in the purchaser in fee simple, freed and discharged of all trusts, contingencies and remainders and indefeasible by any party or persons having a present or expectant interest therein in accordance with the Act of Assembly in such case made and provided.

And your petitioner will ever pray, etc.

*The —— Company ——, Guardian
of the Estate of ——, a minor.*

By———

State of Pennsylvania,
City and County of Philadelphia, ss:

—— being duly sworn according to law, deposes and says that he is —— of the corporation petitioner, and that the facts set forth in the foregoing petition are true and correct to the best of his knowledge, information and belief.

Sworn to and subscribed before me this
—— day of ——, 1921.

In the Orphans' Court of Philadelphia County.
In the matter of the Estate of ——, a minor.
—— Term, ——, No. ——.

DECREE.

And Now, to wit, this ——— day of ———, 1921, on consideration of the annexed petition and affidavits thereto annexed and on motion of ———, attorneys for the petitioner, it appearing that it would be to the best interest and advantage of the estate of ———, a minor, that the premises described in the petition should be sold to ——— at private sale for the sum of \$———, in cash and that the said price is better than can be obtained at public sale and that the same may be done without injury or prejudice to any trust, charity or purpose for which the same is held and without the violation of any law which may confer an immunity or exemption from sale or alienation, *It is ordered and decreed* that the said sale be confirmed and that the said The ——— Company ———, Guardian of the Estate of ———, is hereby authorized and empowered to join in the sale and conveyance of the said premises, to wit, (description): being known as premises ——— Street, Philadelphia, to ———, for the price or sum of \$———, in cash; the title of the purchaser to be a fee simple title, indefeasible by any party or persons having a present or expectant interest in the said premises and unprejudiced by any error in the proceedings of the Court; security to be entered in the sum of \$———, and the bond of the said The ——— Company ———, is hereby approved as such security.

By the Court:

**65. PETITION UNDER THE REVISED PRICE ACT
BY TRUSTEE FOR LEAVE TO SELL AN IRRE-
DEEMABLE GROUND RENT AT PRIVATE
SALE. 183.**

In the Orphans' Court for the County of Philadelphia.

In re Estate of ———, Deceased.

——— Term, ———, No. ———.

Petition for Leave to Sell Ground Rent at Private Sale.

To the Honorable, the Judges of the Said Court:

The petition of the Acme Trust Company, Trustee under the will of ———, Deceased, respectfully represents:

1. That ———, late of the City and County of Philadelphia, died ———, having first made and published his last will and testament, duly probated in the office of the Register of Wills in and for the County of Philadelphia.

2. In and by said will testator (here recite pertinent provisions of will):

A copy of the will of ————— is annexed hereto and marked Exhibit "A" and made a part hereof.

3. (Recite here parties in interest and how acquired.)

4. That among the assets of the residuary estate of the above decedent is the following described irredeemable ground rent, to wit: (give here description in latest deed):

being the same ground rent that was acquired inter alia by the said ——— by indenture bearing date the ——— day of ———, and recorded at Philadelphia, in Deed Book ———, No. ———, page ———, etc., being now known as premises ——— Street, in the City of Philadelphia.

5. That a sale of the aforesaid irredeemable ground rent has been made subject to the approval of your Honorable Court to ———, for the price or sum of \$—— in cash.

6. That although there is a power of sale under the will of ———, deceased, your petitioner is advised that said power does not cover the ——— interest of ———, and her husband and the ——— interest of ———, and his wife, purchased by your petitioner by virtue of proceedings duly had in this Court. This petition is therefore presented.

7. Your petitioner has been assured by real estate experts familiar with the values of real estate in the vicinity that the price or sum of \$—— is a full and fair price for the said ground rent and is more than could be obtained therefor at public sale. Their affidavits are attached hereto and made part hereof as Exhibits "B" and "C."

8. That the said property out of which the said ground rent is payable is assessed in the sum of \$——, as will appear by the official certificate of the Board of Revision of Taxes hereto annexed as Exhibit "D."

9. That your petitioner is of the opinion that it is for the best interest and advantage of the said estate to sell the said ground rent as herein set forth.

10. That all of the parties in interest as hereinabove set forth have joined in the prayer of this petition.

11. That the said sale may be made without injury or prejudice to any trust, charity or purpose for which the same is held and without the violation of any law which may confer immunity or exemption from sale or alienation.

Wherefore your petitioner being without authority as aforesaid to make sale of said ground rent without the order of your Honorable Court, makes this application under the Revised Price Act of 1917, and prays for leave and authority to sell, assign and convey the said ground rent hereinbefore described to ———, upon receipt of the purchase price of \$———, said conveyance to vest the title of the said ground rent in the said ———, freed and discharged of all trusts, contingencies and remainders and indefeasible by any party or persons having a present or expectant interest therein, in accordance with the provisions of the Act of Assembly in such case made and provided.

And your petitioner will ever pray, etc.

ACME TRUST COMPANY,

By—————

Trustee under the Will of ———, Deceased.

County of Philadelphia, ss:

——— being duly sworn according to law, deposes and says that he is ——— of the corporation petitioner, and that the facts set forth in the foregoing petition are true to the best of his knowledge, information and belief.

Sworn to and subscribed before me this
——— day of ———, 1920.

JOINDER.

We, the undersigned, being all parties presently interested in the estate of ———, acknowledge that we have received notice of the presentation of the foregoing petition and join in the prayer thereof.

EXHIBIT "B."

County of Philadelphia, ss:

—— being duly sworn according to law, deposes and says that he is a real estate expert of —— years' experience; that he is familiar with the values of real estate in the city of Philadelphia; that he has examined the premises described in the foregoing petition and in his opinion the price or sum of \$——, offered for the said ground rent is a full and fair price therefor, and more than could be obtained for the same at public sale.

And further deponent saith not.

Sworn to and subscribed before me this

—— day of ——, 1920.

EXHIBIT "C."

County of Philadelphia, ss:

—— being duly sworn according to law, deposes and says that he is a real estate expert of —— years' experience; that he is familiar with the values of real estate in the city of Philadelphia; that he has examined the premises described in the foregoing petition and in his opinion the price or sum of \$——, offered for the said ground rent is a full and fair price therefor, and more than could be obtained for the same at public sale.

And further deponent saith not.

Sworn to and subscribed before me this

—— day of ——, 1920.

DECREE.

And Now, to wit, this —— day of ——, 1920, upon consideration of the foregoing petition and on motion of ——, attorneys for the petitioner, it appearing that it will be to the interest and advantage of all the parties interested therein that the said ground rent, to wit: (repeat description here): being now known as premises —— Street, in the city of Philadelphia, should be sold to ——, for the sum of \$——, in cash; that the said sum is a better price than could be obtained at public sale; that the same may be made without injury or prejudice to any trust, charity or purpose for which the same is held and without the violation of any law which may confer immunity or exemption from sale or alienation, the Court grants

the prayer thereof and authorizes and empowers the Acme Trust Company, trustee under the will of ———, deceased, to sell, convey and assign the said ground rent to the said ———, upon receipt of the purchase price, the title of the purchaser to be a fee simple title, indefeasible by any party or persons having a present or expectant interest therein and freed and discharged of all remainders and unprejudiced by any error in the proceedings of the Court. Security to be entered in the sum of \$———, the bond of the said Acme Trust Company is hereby approved as such security.

By the Court:

J.

**66. PETITION UNDER THE REVISED PRICE ACT
BY TRUSTEE FOR LEAVE TO ASSIGN AND
EXTINGUISH AN IRREDEEMABLE GROUND
RENT ON A THREE PER CENT. BASIS. 183.**

In the Orphans' Court of Philadelphia County.
In the matter of the Estate of ———, deceased.
——— Term, ———, No. ———.

Petition for Leave to Assign and Extinguish Irredeemable
Ground Rent.

To the Honorable, the Judges of the Said Court:

The petition of The ——— Company ———, respectfully represents:

1. That ——— died in ———, seized of all that certain yearly rent or sum of \$———, lawful silver money of the United States of America, payable in equal half yearly payments on the first days of the months of ——— and ———, in each and every year after the ——— day of ———, forever, excepted and reserved out of (recite here description from last deed): being known as ——— and ——— Street, and ——— Street, Philadelphia, which premises were conveyed by the said ——— to ———, by indenture dated the ——— day of ———, and recorded in Philadelphia, in Deed Book ———, page ———, &c., and the said ———, in and by her will dated ———, duly probated in Philadelphia devised and bequeathed certain property therein

mentioned, including the aforesaid ground rent to her trustees in trust for ———, for life with power of appointment and the said ——— died ———, having first made, published and declared her last will and testament dated ———, a copy of which is hereto annexed marked Exhibit "A," duly probated in Philadelphia County, as will ———, and recorded in Will Book ———, page ———, and the said ———, in and by her said will did give, devise and bequeath property over which she had power of appointment, including said ground rent, to your petitioner in trust for the benefit of her daughters for life, subject to annuities of \$———, each to her two sons with power in the daughters of continuing the trust for their children if they think proper and in further trust if any of her children should die leaving lawful issue then living, such children to take their respective parent's share.

2. The said ——— was survived by her husband, ———, since deceased, and by five children, to wit: ———, all of whom are living and of full age, except ———, who died ———, intestate, unmarried and without issue. The surviving four children of the decedent have no issue so that they are the only parties interested in this estate.

3. The present owner of the fee simple title to the said premises is ———, who has offered to purchase and extinguish the said ground rent for the sum of \$———, in cash and subject to the approval of your Honorable Court, your petitioner has agreed to assign and extinguish the said ground rent to the said ——— for the price aforesaid which is on a basis of three per cent.

4. Your petitioner believes that it will be to the best interest and advantage of the estate of the said ——— to assign and extinguish the said ground rent for the aforesaid consideration as by doing so the income to the estate can be practically doubled.

5. The said premises are assessed in the sum of \$———, as will appear from the official certificate of the Board of Revision of Taxes hereto annexed marked Exhibit "B."

6. Your petitioner has been assured by two disinterested real estate experts familiar with the values of real estate in the vicinity of the premises that the sum of \$——— in cash is a full and fair price for the same and more than could be obtained therefor at public sale and their affidavits to this effect are attached hereto and made a part hereof as Exhibits "C" and "D."

7. That your petitioner, under the terms of the said will, is without authority to make sale of such ground rent without the consent of your Honorable Court and by reason thereof this petition is presented.

Wherefore your petitioner prays for leave to sell and extinguish the ground rent hereinbefore described to ———, upon receipt of the purchase price, to wit: \$——— in cash; said conveyance to vest the title of the said ground rent in the said purchaser, freed and discharged of all trusts, contingencies and remainders, indefeasible by any party or persons having a present or expectant interest therein in accordance with the provisions of the Act of Assembly in such case made and provided.

And your petitioner will ever pray, etc.

THE ——— COMPANY ———.

By—————

State of Pennsylvania, County of Philadelphia, ss:

——— being duly sworn according to law, deposes and says that he is the ——— of the corporation petitioner, and that the facts set forth in the foregoing are true to the best of his knowledge, information and belief.

Sworn to and subscribed before me this
——— day of ———, 1921.

JOINDER.

We, the undersigned, being all the parties interested in the estate of ———, deceased, hereby acknowledge that we have received notice of the presentation of the foregoing petition and join in the prayer thereof.

EXHIBIT "C."

State of Pennsylvania, County of Philadelphia, ss:

——— being duly sworn according to law, deposes and says that he is a real estate expert of ——— years' experience; with an office at ———, Philadelphia; that he is familiar with the values of real estate in the City of Philadelphia; that he has examined the premises described in the foregoing petition and in his opinion the price or sum of \$——— in cash offered for the

ground rent reserved thereout is a full and fair price therefor, and more than could be obtained for the same at public sale.

And further deponent saith not.

Sworn to and subscribed before me this
 ——— day of ———, 1921.

In the Orphans' Court of Philadelphia County.

In the matter of the Estate of ———, deceased.

——— Term, ———, No. ———.

DECREE.

And Now, to wit, this ——— day of ——— 1921, upon consideration of the annexed petition and affidavits thereto attached, and on motion of ———, attorneys for the petitioner, it appearing that it will be to the interest and advantage of the estate of ———, deceased, that the said yearly rent of \$———, lawful silver money, payable half yearly on the first days of the months of ——— and ———, in each and every year after the ——— day of ———, forever, excepted and reserved out of (description of property):

being known as ——— and ——— Street, and ——— Street, should be sold, assigned and extinguished to ——— for \$——— in cash and it further appearing that the same may be made without injury or prejudice to any trust, charity or purpose for which the same is held and without the violation of any law which may confer an immunity or exemption from sale or alienation and that the said sum of \$——— in cash is a better price than could be obtained for the same at public sale, *It is ordered and decreed* that the said sale by The ——— Company ———, Trustee under the will of ———, deceased, as aforesaid, be and the same is hereby confirmed and the said The ——— Company ———, Trustee as aforesaid, is hereby authorized and empowered, upon receipt of said sum of \$———, and all arrearages of ground rent to the day of settlement, to convey the said ground rent to ———, the title of the purchaser to be in fee simple, indefeasible by any party or persons having a present or expectant interest in the said premises and unprejudiced by any error in the proceedings of the Court; secu-

urity to be entered in the sum of \$——, and the bond of the said
The —— Company ——, is hereby approved as such security.

By the Court :

J.

**67. PETITION UNDER THE REVISED PRICE ACT
BY A GUARDIAN FOR THE APPOINTMENT OF
A TRUSTEE TO MAKE PRIVATE SALE OF
REAL ESTATE IN WHICH THE MINOR HAS AN
INTEREST. 185.**

In the Orphans' Court of Philadelphia County.

In the matter of the Estate of ——, deceased.

—— Term, ——, No. ——.

Petition for Appointment of Trustee to Make Sale of Real Estate
Under the Revised Price Act of 1917.

To the Honorable, the Judges of the Said Court:

The petition of —— respectfully represents:

1. ——, the above decedent, died ——, intestate, leaving
to survive her her husband, ——, your petitioner and one child, a
minor, ——, and no other children or issue of deceased children.

2. That —— Trust Company has been duly appointed
guardian of the estate of the said minor by your Honorable
Court.

3. The said decedent died seized and possessed of (describe
property):

under and subject to certain building restrictions therein men-
tioned and also subject to the payment of a certain mortgage debt
or principal sum of \$——, together with interest thereon as
therein mentioned, said premises being known as —— Street,
Philadelphia, and being the same premises that —— by deed
dated ——, and recorded at Philadelphia, in Deed Book ——,
page ——, &c., granted and conveyed unto the said —— in
fee.

4. Title to the said premises is vested in the said minor subject
to the life estate of her father, ——.

5. Subject to the approval of your Honorable Court, the prem-
ises above described have been sold at private sale to ——, for

the price or sum of \$——, payable \$—— in cash and \$—— at the expiration of five years, secured by a bond and mortgage in the usual form with interest at 6 per cent. per annum, said mortgage of \$—— now on said premises with interest accrued thereon to be paid out of said purchase price at time of settlement.

6. Your petitioner is of the opinion that the price offered for the said real estate is full and fair and better than could be obtained for the same at public sale and that it would be for the best interest and advantage of the estate of the said minor that the said sale be consummated in accordance with the terms hereinabove set forth because the price offered is better than could be obtained at public sale, that the sale may be made without injury or prejudice to any trust, charity or purpose for which the same is held and without the violation of any law which may confer an immunity or exemption from sale or alienation.

7. Your petitioner has been assured by two disinterested real estate experts experienced in the values of properties in the neighborhood of that hereinabove referred to that the price offered for the same is full and fair and the best that could be obtained at public sale. Their affidavits to this effect are hereto annexed as Exhibits "A" and "B."

8. That the only party interested in the said estate of the said decedent other than your petitioner, to wit: the said minor, by her guardian is satisfied that the price offered for the said premises, payable as aforesaid, is a full and fair one and better than could be obtained at public sale and that the acceptance of the same will be for the best interest and advantage of the estate of the said minor. The said minor by her guardian has received notice of the intended presentation of this petition and has joined in the prayer thereof.

9. That the said premises are assessed for taxation in the sum of \$—— as appears by the official certificate hereto annexed marked Exhibit "C."

10. Your petitioner presents this petition to your Honorable Court under Section 6 of the Revised Price Act of 1917, for the confirmation of said sale and the appointment of a trustee to make sale of the said premises and to receive and hold the proceeds of said sale in trust for the parties in interest therein until

the termination of your petitioner's life estate and thereupon to pay over the principal sum to the person or persons entitled thereto.

Wherefore your petitioner prays:

1. That said private sale to ——— be confirmed.
2. That The ——— Company ———, be appointed trustee to carry out the said sale and convey the said premises.

3. That the said The — Company —, be authorized, empowered and directed as such trustee to convey the said premises hereinabove set forth to the said — for the price or sum of \$——, payable \$—— in cash and \$—— at the expiration of five years, secured by a bond and mortgage in the usual form with interest at 6 per cent. per annum, said mortgage of \$—— now on said premises with interest accrued thereon to be paid out of said purchase price at time of settlement, and to receive and hold the proceeds of such sale in trust for the parties in interest therein and invest the same in investments authorized by law and pay the interest thereof as it shall accrue to — for life until the said life estate shall have terminated and thereupon to pay over the principal sum to the person or persons entitled to such remainder, the title of the purchaser to be indefeasible by any persons, ascertained or unascertained, or any person or class of persons mentioned in this petition or decree and having a present or expectant interest in the premises and unprejudiced by any error in the proceedings of the Court.

And your petitioner will ever pray, &c.

State of Pennsylvania,
County of Philadelphia, ss:

—— being duly sworn according to law, deposes and says that he is the petitioner herein and that the facts set forth in the foregoing petition are true to the best of his knowledge, information and belief.

Sworn to and subscribed before me this
—— day of ———, 1921.

JOINDER.

I, the undersigned, being the only party interested in the premises referred to in the foregoing petition, other than your petitioner, hereby acknowledge that I have received notice of the intended presentation of foregoing petition and join in the prayer thereof.

By _____
Guardian.

EXHIBIT "A."

Commonwealth of Pennsylvania,
City and County of Philadelphia, ss:

Personally appeared _____, who, being duly sworn according to law, deposes and says that he is a real estate expert of _____ years' experience, now engaged in business at _____; that during said period he has been engaged in actively carrying on his profession in the County of Philadelphia; that he is familiar with the values of real estate in the vicinity of the real estate referred to in the foregoing petition; that he has examined the premises therein described and as the result of said examination is of the opinion that the sum of \$_____, payable as in said petition set forth, represents the full market value of the said premises and is a greater price than could be obtained for the same at public sale, and that a sale thereof at the said price would be to the best interest and advantage of said estate.

Sworn to and subscribed before me this
_____ day of _____, 1921.

In the Orphans' Court of Philadelphia County.
In the matter of the estate of _____, deceased.
_____ Term, _____, No. _____.

DECREE.

And Now, to wit, this _____ day of _____, 1921, upon consideration of the annexed petition and on motion of _____, attorneys for the petitioner, it appearing that it will be to the interest and advantage of the estate of _____, a minor, and all

parties interested in the estate of ———, deceased, that the said premises, to wit (description) :

under and subject to certain building restrictions therein mentioned and also subject to the payment of a certain mortgage debt or principal sum of \$———, together with interest thereon as therein mentioned, said premises being known as ——— Street, Philadelphia, should be sold to ——— for \$———, payable \$——— in cash and \$——— at the expiration of five years, secured by a bond and mortgage in the usual form, with interest at 6 per cent. per annum, said mortgage of \$——— now on said premises with interest accrued thereon to be paid out of said purchase price at time of settlement ; that the said sum of \$——— is a better price than could be obtained at public sale, that the same may be made without injury or prejudice to any trust, charity or purpose for which the same is held and without the violation of any law which confer an immunity or exemption from sale or alienation, *It is hereby ordered and decreed:*

1. That the said private sale to ——— be and the same hereby is confirmed.

2. That The ——— Company ———, be and the same is hereby appointed trustee to carry out the said sale and convey the said premises.

3. That the said The ——— Company ———, be and the same is hereby authorized, empowered and directed as such trustee to convey the said premises hereinabove set forth to the said ——— for the price or sum of \$———, payable \$——— in cash and \$——— at the expiration of five years, secured by a bond and mortgage in the usual form, with interest at 6 per cent. per annum, said mortgage of \$——— now on said premises with interest accrued thereon to be paid out of said purchase price at time of settlement and to receive and hold the proceeds of such sale in trust for the parties in interest therein and invest the same in investments authorized by law and pay the interest thereof as it shall accrue to ———, for life until the said life estate shall have terminated and thereupon to pay over the principal sum to the person or persons entitled to such remainder, the title of the purchaser to be indefeasible by any person, ascertained or unascertained or any person or class of persons mentioned in the foregoing petition or this decree and having a present or expectant interest in the premises and unprejudiced by any error in the

proceedings of the Court; security to be entered in the sum of \$——, and the bond of the said The —— Company ——, is hereby approved as such security.

By the Court:

J.

**68. PETITION UNDER THE REVISED PRICE ACT
BY TRUSTEES FOR LEAVE TO SELL REAL
ESTATE AT PRIVATE SALE AND BY A CO-
TRUSTEE TO PURCHASE AT SUCH SALE. 202.**

In the Orphans' Court of Philadelphia County.

In the matter of the Estate of ——, deceased.

—— Term, ——, No. ——.

Petition by Trustees for Leave to Sell Real Estate at Private

Sale, and by Co-Trustee to Purchase at Such Sale.

To the Honorable, the Judges of the Said Court:

The petition of ——, Trustee, and ——, substituted Trustee, under the last will of ——, deceased, respectfully represents:

1. That the said decedent, ——, died on the —— day of ——, having first made, published, and declared his last will and testament, a copy of which is annexed hereto as Exhibit "A," dated ——, duly probated in the office of the Register of Wills, of Philadelphia County, wherein and whereby he did devise and bequeath the residue of his estate to his trustees in trust after the death of his wife, ——, (she died ——), to (recite terms of trust):

2. That the decedent nominated the —— Company ——, and ——, as trustees and the said —— Company renounced its right to act as such trustee, and by decree of your Honorable Court dated ——, it was discharged as such trustee and —— was appointed substituted and co-trustee in its place and stead.

That among the assets of the said decedent are premises —— Avenue, ——, Philadelphia, occupied and used in part by the said ——, trading as ——.

That the said —— desires to purchase the said property from the estate for the price or sum of \$——, but being a purchase

by a trustee at his own sale, the power of sale given the trustee under the will is inoperative and it is necessary that he obtain the approval of your Honorable Court in so doing.

3. That among the assets of the said estate are the following described parcels of real estate in the City of Philadelphia (describe them) :

4. Parcels 1 to 9 hereinabove recited now comprise one lot of ground fronting ——— feet on ——— Avenue, and extending ——— feet along ——— Street, and are occupied by one large four-story brick building occupied by the ———.

Parcels 10 and 16 to 20 inclusive, comprise one property fronting ——— on ——— Street, and extending ——— through to ——— Street, ——— feet, and are occupied by a stable and garage used in connection with the said ———.

Parcels 11 to 15 above described are five small lots, each containing a two-story brick cottage with frame fronts and frame enclosed sheds set back from the street with front and side yards.

In the ——— property all the machinery, fixtures and equipment are owned by ———, individually as a part of the business of the ———, of which he is sole proprietor. The real estate is rented in connection with the ——— for \$—— per annum, at an annual rental of \$—— from which is payable taxes \$——, and insurance \$——. The stable and garage are rented in connection with the ——— for \$—— per annum, from which is payable taxes \$——, and insurance \$——. The 5 cottage properties on ——— Street are now idle, but heretofore rented at \$—— per annum, from which has been payable taxes \$——, insurance \$——, and repairs on an average of \$—— per annum, so that the total income from all sources derived from the real estate herein described has been \$——, and the annual carrying charges \$—— per year, not including the interest on the mortgage of \$——, held by the ——— Trust Company on the said real estate at ———, so that the net rent of the properties clear of encumbrances would be \$—— per annum, which is ——— on a valuation of \$——.

5. Premises ——— to ——— Avenue (parcels 1 to 9), are assessed at \$——, as shown by the official certificate hereto annexed as Exhibit "B." Premises ——— Street (parcels 10 and 16 to 20), are assessed at \$——, as shown by the official certificate hereto annexed as Exhibit "G." Premises ———

Street (parcels 11 to 15), are assessed at \$——, as shown by the official certificate hereto annexed as Exhibit "D."

6. The said —— was survived by (recite parties) :

7. All of said parties in interest, the same being all the parties having any interest in this estate have received notice of the intended presentation of this petition, and have joined in the prayer thereof.

8. ——, one of your petitioners, as before set forth, is the proprietor of the ——, which occupies and uses most of the premises hereinabove described in connection with its business. The boilers used in connection with the —— were installed in ——, and are about worn out so that it is necessary to replace the same and for this purpose if the property is to continue under its present management it will be necessary to build a power house on parcels 11 to 15, fronting on —— Street, but the estate has no funds with which to make the necessary repairs, improvements and additions to the premises in order to continue them in tenable condition for the uses and purposes to which they are now devoted. The said —— has, therefore, offered to buy the real estate hereinabove described, clear of encumbrance, for the price or sum of \$——, \$—— in cash and the balance of \$—— to be secured by a mortgage in the usual form, payable at —— years at ——. A settlement on this basis will net the estate approximately \$—— per annum, as against a net rent on the present investment of \$——.

9. While the trustees have a power of sale under the will of the said decedent, one of the trustees desires to purchase at his own sale, and it is necessary that the consent of your Honorable Court be secured thereto.

10. Subject, therefore, to the approval of your Honorable Court, the premises hereinabove described together with the buildings and improvements thereon erected have been sold at private sale to ——, for the price or sum of \$——, clear of encumbrance, from which is to be paid the existing mortgage of \$——, purchase price to be payable \$—— in cash and the balance at the expiration of —— years, to be secured by the bond and mortgage of the purchaser in the usual form at ——.

11. Your petitioners as trustees for the reasons hereinabove set forth are of the opinion that the price offered for the said real estate is full and fair and better than could be obtained for the

same at public sale, and that it would be for the best interest and advantage of the estate of ———, and the parties interested therein, that the said sale be consummated in accordance with the terms hereinabove set forth, because the price offered is better than could be obtained at public sale, and that the sale may be made without injury or prejudice to any trust, charity, or purpose for which the same is held and without violation of any law which may confer an immunity or exemption from sale or alienation.

12. Your petitioners have been assured by two real estate experts, unrelated to the parties, and unconnected with the estate, and having no interest whatever in the subject matter of this petition, and the said experts, being experienced in the values of property in the neighborhood of those hereinabove referred to, are of opinion that the price offered for the same as a whole is full and fair and better than could be obtained at public sale, and affidavits to this effect are hereto annexed as Exhibits "E" and "F."

13. That all parties interested in the said estate as hereinabove set forth are satisfied that the price offered for the said premises is a full and fair one and better than could be obtained at public sale, and that the acceptance of the same will be for the best interest and advantage of the said estate.

14. ———, one of your petitioners, therefore, prays your Honorable Court for leave and authority to purchase the premises hereinbefore set forth which are described as a whole as follows (description):

from the estate of ———, for the price or sum of \$———, payable as aforesaid; and ———, substituted trustee under the will of ———, deceased, one of your petitioners, prays your Honorable Court for leave and authority to sell and convey the said premises, ———, for the price or sum of \$———, payable as hereinabove set forth, said conveyance to vest the title in the purchaser in fee simple, freed and discharged of all trusts, contingencies and remainders, and indefeasible by any party or persons having a present or expectant interest therein in accordance with the Act of Assembly in such case made and provided.

And your petitioners will ever pray, etc.

State of Pennsylvania,
City of Philadelphia, ss:

——— and ———, being duly sworn according to law, depose and say that they are the petitioners herein and that the facts set forth in the foregoing petition are true and correct to the best of their knowledge, information and belief.

Sworn to and subscribed before me
this —— day of ——, 1921.

(Signatures.)

JOINDER.

We, the undersigned, being all the parties interested in the premises referred to in the foregoing petition, hereby acknowledge that we have received notice of the intended presentation of the foregoing petition and join in the prayer thereof.

EXHIBIT "E."

Commonwealth of Pennsylvania,
City and County of Philadelphia, ss:

Personally appeared ———, who, being duly sworn according to law, deposes and says that he is a real estate expert of —— years' experience; that he is now engaged in business in Philadelphia; ———, that during the period above mentioned he has been actively engaged in carrying on his profession in the City and County of Philadelphia; that he is familiar with the values of real estate in the vicinity of the premises referred to in the foregoing petition; that he has examined the premises therein described and values them as follows (description of valuation): and as a result of said examination is of the opinion that the sum of \$——, payable \$—— in cash, and \$—— at the expiration of three years, secured by bond and mortgage in the usual form, at 6 per cent. per annum represents the full market value of the said premises, and is a greater price than could be obtained for same at public sale, and that a sale thereof at the said price would be to the best interests and advantage of the said estate.

Sworn to and subscribed before me this
—— day of ——, 1921.

In the Orphans' Court of Philadelphia County.

In re Estate of ———, deceased.

——— Term, ———, No. ———.

DECREE.

And Now, the ——— day of ———, on consideration of the foregoing petition and affidavits thereto annexed, it appearing that all of the cestuis que trustent and parties in interest have joined therein, and on motion of ———, counsel for the petitioners, it appearing that it will be to the interest and advantage of the trust under the will of the said ———, deceased, as well as to the interest and advantage of the said cestuis que trustent and all other parties in interest thereunder that the premises described in the foregoing petition, to wit, (description) :

should be sold to ———, for the sum of \$———, of which sum \$——— shall be secured by a purchase money mortgage on the above described premises as hereinafter set forth, and that the said price of \$——— is a better price than the same would bring at public sale, and it further appearing that the same may be done without injury or prejudice to any trust, charity or purpose for which the same is held and without the violation of any law which may confer immunity or exemption from sale or alienation ; *It is ordered and decreed* that ———, trustee, and ———, substituted trustee under the will of ———, deceased, be and they are hereby authorized and empowered to sell and convey the said premises to the said ———, as an individual, for the price of \$———, payable as follows: in cash the sum of \$———, and the balance of \$——— to be secured by bond and mortgage in the usual form, payable at the expiration of ——— years from the date thereof with interest thereon at ——— per centum per annum, payable half yearly, said bond and mortgage to be given and executed by the said ——— as an individual to ———, trustee and ———, substituted trustee under the will of ———, deceased, the said bond and mortgage to be held by the said trustees under the same trust and for the same uses and purposes and subject to the same rights, title and estate as the said premises have heretofore been held by the said trustees, with authority in the said trustees to pay out of the said settlement the present mortgage debt or principal sum of \$———, now a valid and subsisting lien on the said premises, with interest thereon to the date of

settlement, the title of the purchaser to be a fee simple title, indefeasible by any party or persons having a present or expectant interest in the said premises, and unprejudiced by any error in the proceedings of the Court; the said trustees as aforesaid, first entering security as hereinafter directed.

And it is further ordered and decreed that the said ———, one of the trustees as aforesaid, be authorized and permitted to purchase the above described premises from ———, trustee, and ———, substituted trustee as aforesaid, for the sum of \$———, first paying the sum of \$——— in cash, and executing and delivering to the said ———, trustee, and ———, substituted trustee as aforesaid, his purchase money bond and mortgage in the just sum of \$———, in the usual form and containing provisions providing for the payment of all taxes, water rents, insurance premiums and commissions, and having also previously delivered to the said ———, trustee, and ———, substituted trustee as aforesaid, fire insurance policies in approved companies with the usual mortgagee clause thereto attached, in the sum of at least \$———; said bond and mortgage to be secured not only upon the above described premises, but also upon any addition thereunto made, and upon all boilers, engines, machinery and equipment now or hereafter belonging to the said ———, the mortgagor, located upon the above described premises or upon any addition or additions hereinafter erected on said premises; and upon his so doing to hold the said premises and any additions thereto, free and clear of any trusts for the estate of the said ———, deceased, for any parties or persons having a present or expectant interest in said premises or additions and unprejudiced by any error in the proceedings of the Court.

And it is further ordered and decreed that ———, trustee, and ———, substituted trustee as aforesaid, are hereby authorized and empowered to execute and deliver to the purchaser, ———, as an individual, a deed of conveyance in fee simple, indefeasible by any party or persons having a present or expectant interest in the said premises and unprejudiced by any error in the proceedings of the Court upon full compliance upon the part of the purchaser with the terms and conditions of the sale as hereinabove set forth.

The said ———, trustee, and ———, substituted trustee as aforesaid, are directed to enter security in the sum of \$——.

By the Court:

J.

69. ELECTION OF WIDOWER TO TAKE UNDER WILL. 245.

In the Orphans' Court of Philadelphia County.

In re Estate of ———, deceased.

——— Term, ———, No. ———.

To Whom it May Concern:

I, ———, widower of the above decedent, who died on the ——— day of ———, having first made, published and declared her last will and testament, duly probated in the office of the Register of Wills of Philadelphia County, on ———, hereby elect to take under the terms of the said will.

In Witness Whereof I have hereunto set my hand and seal this ——— day of ———, A. D. ———.

_____(Seal)

Philadelphia County, ss:

On this ——— day of ———, A. D. ———, before me the subscriber, a notary public in and for the Commonwealth of Pennsylvania, residing in the City of Philadelphia, personally appeared ———, and acknowledged the foregoing election to be his act and deed and desired that the same might be recorded as such.

Witness my hand and notarial seal the day and year last above written.

_____*Notary Public.*

70. ELECTION OF WIDOW TO TAKE AGAINST WILL. 245.

In the Orphans' Court for the County of Philadelphia.

In re Estate of ———, deceased.

——— Term, ———, No. ———.

NOTICE OF ELECTION.

To The ——— Trust Company, Executor of last will and testament of the said decedent.

To Register of Wills and Clerk of the Orphans' Court of Philadelphia.

To Legatees, Devisees and Creditors of the above Estate.

You will please take notice that I, ———, widow of the said ———, deceased, do hereby elect to take against the will of the said decedent, and in lieu thereof to take and receive my share of said estate under the Intestate Laws, and would request you to record and file this notice in accordance with the Act of Assembly in such case made and provided.

—————(Seal)

Commonwealth of Pennsylvania,
City and County of Philadelphia, ss:

On this ——— day of ———, before me the subscriber, a Notary Public in and for the Commonwealth of Pennsylvania, and residing in ———, personally appeared the above named ———, widow of ———, deceased, and in due form of law acknowledged the said notice of her election to be her act and deed for the purposes therein mentioned, and desired that the same might be recorded as such.

Witness my hand and Notarial seal the day and year aforesaid.

**71. PETITION TO THE REGISTER TO REVOKE
LETTERS OF ADMINISTRATION UPON THE
DISCOVERY OF A WILL 264.**

In the Register's Court of Philadelphia County.

Estate of ———, deceased.

Administration No. ———.

**PETITION TO REVOKE LETTERS OF ADMIN-
ISTRATION.**

To the Honorable, ———, Register of Wills, of Philadelphia County:

The petition of ——— Trust ——— Company respectfully represents:

1. That ———, a citizen of the United States of America, and resident of Philadelphia County, State of Pennsylvania, departed this life at No. ——— Street, in the County of Philadelphia, and State of Pennsylvania, on or about ———, the ——— day of ———.

2. That the said ——— was buried on the afternoon of ———.

3. That on ———, the Register of Wills of Philadelphia County, granted letters of administration on the estate of ——— to ———, upon a petition presented by her, stating that said ——— had died intestate, and that she, ———, was his widow and sole heir.

4. That at least two short certificates have been issued by the Register to said ———.

5. That the said ——— left a last will and testament, which was found in his safe deposit box at the ——— Trust ——— Company, when opened by your petitioner, at request of and in the presence of ———, to look for a will.

6. That said last will and testament, a copy of which is hereto annexed, has been duly filed with the Register by your petitioner.

7. That in and by said last will and testament, the decedent nominated, constituted and appointed your petitioner, ——— Trust ——— Company, his executor.

And your petitioner therefore prays that citation should be issued to said ———, to show cause why letters of administration should not be revoked.

And your petitioner will ever pray, &c.

———— Trust ——— Company,

Per—————

Trust Officer.

County of Philadelphia, ss:

———— being duly sworn, deposes and says: I am Trust Officer of ——— Trust ——— Company, the above petitioner, and am authorized to make this affidavit on its behalf, and that the facts set forth are true to the best of my knowledge, information and belief.

Sworn and subscribed to before me this
———— day of ———, 1920.

(Signature.)

DECREE.

And Now, to wit, this ——— day of ———, on consideration of the within petition and on motion of ———, attorneys for the petitioner it is hereby *ordered and decreed* that a citation issue directed to ———, individually and as administratrix of the estate of ———, deceased, to show cause why letters of admin-

istration heretofore issued to her, No. ———, of ———, on ———, should not be revoked and the last will and testament of the said ——— dated ———, be probated and letters testamentary thereon granted to the ——— Trust ——— Company, the executor named therein, returnable ———.

Register of Wills of Philadelphia County.

72. PETITION TO REGISTER FOR CITATION ON PARTY IN CUSTODY OF WILL TO PRESENT SAME FOR PROBATE OR ON FAILURE THEREOF TO SHOW CAUSE WHY LETTERS OF ADMINISTRATION SHOULD NOT BE GRANTED.
267.

In re Estate of ———, deceased.
 ——— Term, ———, No. ———.

PETITION FOR CITATION FOR LETTERS TESTAMENTARY OR OF ADMINISTRATION.

To the Honorable ———, Register of Wills of ——— County:
 The petition of ———, respectfully represents:

1. ———, the above decedent, died on the ——— day of ———, while temporarily sojourning in ———.

2. At the time of the death of the said decedent his family residence was at ———, Pennsylvania.

3. The said decedent was survived by no children or issue of deceased children and your petitioner, his widow, is his sole heir.

4. Prior to the death of the said decedent, to wit, on the ——— day of ———, he made, published and declared his last will and testament, a copy of which is annexed hereto, wherein and whereby he appointed ———, his father, of ———, New York, Executor of his estate.

5. The said decedent at the time of his death was seized of certain personal property, to wit: money on deposit in the ——— Trust Company and stock in the ——— Building and Loan Association, to collect which it is necessary that letters be granted in this jurisdiction.

6. That the said ———, executor nominated under the will of the said decedent has neglected and refused and still neglects and refuses to qualify as executor. The said ——— has in his

possession the will of said decedent and has neglected and refused and still neglects and refuses to produce the same before you for probate.

Wherefore your petitioner prays that a citation may issue directed to the said ———, to show cause why he should not appear before the Register of Wills of ——— County, Pennsylvania, with the will of said decedent and qualify as executor of the estate of the said ———, deceased, failing which, to show cause why letters of administration should not be granted to ———, widow of the said decedent to administer the assets of the said decedent in Pennsylvania.

And your petitioner will ever pray, etc.

State of ———, County of ———, ss:

——— being duly sworn according to law, deposes and says that she is the petitioner herein and that the facts set forth in the foregoing petition are true to the best of her knowledge, information and belief.

Sworn to and subscribed before me this
——— day of ———, 1921.

DECREE.

And Now, to wit, this ——— day of ———, 1921, upon consideration of the foregoing petition and on motion of ———, Esq., attorney for the petitioner, *It is hereby ordered and decreed* that the prayer thereof be granted and that a citation issue to ———, of ———, New York, to show cause why he should not appear before the Register of Wills of ——— County, Pennsylvania, and produce the will of ———, deceased, and qualify as executor of the estate of the said ———. deceased, failing which, to show cause why letters of administration should not be granted to ——— widow of the said decedent to administer the assets of the said decedent in Pennsylvania.

By the Court:

J.

73. PETITION TO THE ORPHANS' COURT SUR APPEAL FROM REGISTER TO OPEN THE PROBATE OF A WILL AND ALLOW PROBATE OF AN AFTER-DISCOVERED CODICIL. 285.

In the Orphans' Court of Philadelphia County.

In the matter of the estate of ———, deceased.

——— Term, ———, No. ———.

**PETITION SUR APPEAL FROM REGISTER TO OPEN
PROBATE OF WILL AND ALLOW PROBATE
OF CODICIL.**

To the Honorable, the Judges of the Said Court:

The petition of The ——— Company, ———, respectfully represents:

1. That the decedent died on the ——— day of ———, a resident of Philadelphia County, having first made, published and declared her last will and testament dated ———, and codicil thereto dated ———, which were duly probated by the Register of Wills, of Philadelphia County, on ———, and letters testamentary issued thereunder to your petitioner. Copy of said will and codicil are hereto annexed as Exhibit "A."

2. Since the probate of the said will and codicil an additional codicil has been found by your petitioner dated ———, a copy of which is annexed hereto as Exhibit "B."

3. Under the said will and first codicil, a statement of the parties in interest is as follows (list all parties in interest):

4. All of said parties in interest are living except as above noted and are of full age with the exception of ———, a minor of whose estate, by decree of the Orphans' Court of Delaware County, dated ———, ———, has been appointed guardian ad litem to appear in these proceedings and ——— is a minor of whose estate The ——— Company ———, was appointed guardian by the Orphans' Court of Philadelphia County, on ———, as of ——— Term, ———, No. ———.

5. In order to secure the probate of the said codicil dated ———, an appeal has been taken to your Honorable Court from the decision of the Register of Wills in the above estate, admitting to probate the said will dated ———, and codicil thereto dated ———.

6. All parties in interest as above set forth have received notice of the intended presentation of this petition and have joined in the prayer thereof.

Wherefore your petitioner prays that the said appeal be sustained and that a decree be entered authorizing and directing the Register of Wills of Philadelphia County, to admit to probate the said codicil dated ———, the original of which is now lodged of record in the office of the Register of Wills.

And your petitioner will ever pray, etc.

The ——— Company, ———.

By _____

State of Pennsylvania,
County of Philadelphia, ss:

———, being duly sworn according to law, deposes and says that he is ——— of the corporation petitioner and that the facts set forth in the foregoing petition are true to the best of his knowledge, information and belief.

Sworn to and subscribed before me this
——— day of ———, 1920.

JOINDER.

We, the undersigned, being all the parties interested in the estate of ———, deceased, acknowledge that we have received notice of the intended presentation of the foregoing petition and join in the prayer thereof.

DECREE.

And Now, to wit, this ——— day of ———, upon consideration of the foregoing petition and upon motion of ———, attorneys for the petitioner, *It is hereby ordered and decreed* that the prayer thereof be granted and the appeal of The ——— Company ———, from the decision of the Register of Wills in the estate of ———, admitting to probate a certain paper writing, being the last will and testament of the said decedent dated ———, and codicil thereto dated ———, is hereby sustained and the Register of Wills of Philadelphia County is hereby authorized,

empowered and instructed to admit to probate a second codicil to the said will dated ———, upon legal proof of the proper execution of the same.

By the Court :

J.

74. PETITION FOR THE APPOINTMENT OF AN ADMINISTRATOR D. B. N. C. T. A. WHERE THE DECEDENT HAS BEEN DEAD MORE THAN TWENTY-ONE YEARS. 356.

In the Orphans' Court for the County of Philadelphia.

In re Estate of ———, deceased.

——— Term, ———, No. ———.

To the Honorable, the Judges of the Said Court:

The petition of ——— respectfully represents:

1. The ———, late of the County of Philadelphia, died ———, 1866, having first made and published his last will and testament, wherein and whereby he appointed ———, Executors, to whom letters testamentary were duly granted by the Register of Wills. A copy of said will is hereto annexed.

2. That the said executors duly administered the said estate which came into their hands and have since died.

3. The residuary estate of decedent is held under this trust (give terms of will and outline parties in interest):

All of such parties thus entitled have received notice of the presentation of this petition and have joined in the prayer thereof.

5. Certain assets belonging to said estate not administered by the executors hereinabove referred to have now come to the attention of your petitioner, wherefore it is necessary that an administrator be appointed to administer same.

Wherefore your petitioner, showing to your Honorable Court that the said ——— having died more than twenty-one years ago and that letters of administration de bonis non cum testamento annexo can only be granted upon his estate by the Register of Wills of Philadelphia County, when so authorized and directed by your Honorable Court, pray your Honorable Court to authorize the said Register of Wills of Philadelphia County, to grant letters

of administration de bonis non cum testamento annexo to such person or persons as are now entitled to the same in accordance with the Act of Assembly in such case made and provided.

And your petitioner will ever pray, etc.

County of Philadelphia, ss:

———, being duly sworn according to law, deposes and says that she is the petitioner above named and that the facts set forth in the foregoing petition are true and correct to the best of her knowledge, information and belief.

Subscribed and sworn to before me this
——— day of ———, 1918.

————— *Notary Public.*

JOINDER.

We, the undersigned, being all the parties interested in the estate of ———, deceased, hereby acknowledge that we have received notice of the intended presentation of the foregoing petition and join in the prayer thereof.

(Signatures.)

DECREE.

And Now, to wit, this ——— day of ———, upon consideration of the foregoing petition and on motion of ———, attorneys for petitioner, it is ordered, adjudged and decreed that the prayer of the said petition be granted, and the Register of Wills of Philadelphia County, be and he is hereby authorized to grant letters of administration de bonis non cum testamento annexo on said estate of ———, deceased, to such person or persons as may be entitled thereto under the Act of Assembly of the Commonwealth of Pennsylvania, in such case made and provided.

J.

75. PETITION BY GUARDIAN FOR REDUCTION OF SECURITY ON HIS BOND. 389.

In the Orphans' Court of Philadelphia County.

In re Estate of ———, minors.

——— Term, ———, No. ———.

To the Honorable, the Judges of the Said Court:

The petition of ———, guardian of the estates of ———, minors, respectfully represents:

1. That your petitioner was duly appointed guardian of the estates of the above minors by decree of your Honorable Court, dated ———, wherein security was directed to be entered in the sum of \$——.

2. That the amount of this security was fixed upon the incorrect presumption that each of said minors would be entitled to approximately \$—— as their proportionate share of the estate of ———, deceased.

3. Schedules of distribution have now been filed in connection with the three adjudications of the Honorable ———, sur the trust accounts filed in the estate of ——— deceased, as of ———, and it now appears that each minor is entitled to the sum of \$——, or a total of \$——.

4. Wherefore your petitioner prays that the security directed to be entered by him be reduced from \$—— to \$——.

And he will ever pray, etc.

Guardian of the Estates of ———, Minors.

State of Pennsylvania,
County of ———, ss:

———, being duly sworn according to law, deposes and says that the facts set forth in the foregoing petition are true to the best of his knowledge, information and belief.

Sworn to and subscribed before me this
——— day of ———, 1920.

JOINDER.

I, the undersigned, ———, mother and next of kin of the said minors, hereby acknowledge that I have received notice of the intended presentation of the foregoing petition and join in the prayer thereof.

DECREE.

And Now, to wit, this — day of —, upon consideration of the foregoing petition, *It is hereby ordered and decreed* that the security heretofore required to be entered by —, guardian of the estates of —, minors, in the aggregate sum of \$—, is hereby reduced to the sum of \$—, and that one bond be filed by the said guardian and the — Surety Company, of —, is hereby approved as surety on the said bond.

By the Court:

J.

76. PETITION FOR WIDOW'S EXEMPTION IN CASH.

403.

In the Orphans' Court for the County of Philadelphia.

In re Estate of —, deceased.

— Term, —, No. —.

PETITION FOR WIDOW'S EXEMPTION.

To the Honorable, the Judges of the Said Court:

The petition of —, respectfully represents:

1. That — departed this life on the — day of —, leaving to survive him —, his widow, your petitioner, and one child, —, who is of full age, the said decedent having first made and published his last will and testament dated —, copy of which is attached hereto, duly probated in the office of the Register of Wills for the County of Philadelphia, and letters testamentary upon his estate were granted to The — Company —, the alternative executor named in said will, —, and —, the other executors, having predeceased the testator.

2. That your petitioner has elected to retain as widow of the said —, deceased, from and out of the personal property of the said decedent the sum of \$500 in cash, and prays that the said sum may be set apart and awarded to her under Sec. 12 of the Fiduciaries Act of June 7, 1917, P. L. 447.

And your petitioner will ever pray, etc.

Petitioner.

County of Philadelphia, ss:

——, being duly sworn according to law, deposes and says that she is the petitioner above named and that the facts set forth in the foregoing petition are true and correct to the best of her knowledge, information and belief.

Sworn to and subscribed before me this
—— day of ——, A. D. 1919.

Notary Public.

Commission expires ——.

In the Orphans' Court for the County of Philadelphia.

In re Estate of ——, deceased.

—— Term, ——, No. ——.

DECREE.

And Now, to wit, this —— day of ——, on presentation of proof of publication, and no exceptions thereto having been filed, *It is ordered and decreed* that the sum of \$500 be set apart for and retained by ——, widow of the said decedent, out of the cash belonging to the decedent at the time of his death.

By the Court:

J.

77. PETITION BY TRUSTEE FOR LEAVE TO EXECUTE A LEASE OF REAL ESTATE FOR TEN YEARS. 497.

In the Orphans' Court of Philadelphia County.

In re Estate of ——, deceased.

—— Term, ——, No. ——.

To the Honorable, the Judges of the Said Court:

The petition of the —— Trust Company, ——, under the will of ——, deceased, respectfully represents:

I. That ——, late of the City and County of Philadelphia, died ——, having first made and published his last will and testament, duly probated in the office of the Register of Wills in and for the County of Philadelphia.

2. In and by said will testator gave his residuary estate to your petitioner, in trust (recite terms of trust) :

3. (Here show the parties in interest.)

4. That among the assets of the residuary estate of the said decedent is the following described real estate, to wit: (description) :

5. With the consent of the parties in interest and subject to the approval of your Honorable Court, your petitioner has agreed to execute a lease of the premises hereinabove described as of the —— day of ——, with ——, for the term of ten years, to commence and be computed from the —— day of ——, at the annual rent of \$——, payable monthly in advance in equal payments of \$——, on the first day of each and every month. Copy of the lease suggested is hereto annexed marked Exhibit "B."

6. The assessed value of the said premises is \$——, and the estimated annual return on the assessed valuation of the property based on the said lease after deduction of fixed charges, amounts to \$—— per year, or a return of —— per cent. on the said value.

7. Your petitioner and all parties in interest who are sui juris believe that the execution of the said lease will be to the best interest and advantage of the estate and all parties interested therein either presently or in remainder.

8. That all of the parties in interest as hereinabove set forth have joined in the prayer of this petition either individually or by their attorney duly appointed and constituted for the purpose by letter of attorney duly recorded.

9. Under section 31 of the Fiduciaries Act of 1917, it is necessary that your petitioner apply to your Honorable Court for leave and authority to execute the said lease so that the same shall have the same force and effect as though the said lease were made by the beneficial owner or owners of the said property and he or they were sui juris and owned the property in fee.

Wherefore your petitioner prays for leave and authority to execute a lease of premises (describing them) :

to —— for the term of ten years to commence and be computed from the —— day of ——, for the annual rent or sum of \$——, payable monthly in advance, in equal payments of \$—— on the first day of each and every month, said lease to

be substantially the same in form as set forth in Exhibit "B" attached hereto.

And your petitioner will ever pray, etc.

———, *Trust Company, Trustee under
the Will of ———, deceased.*

By—————

State of Pennsylvania,
City and County of Philadelphia, ss:

———, being duly sworn according to law, deposes and says that he is ——— of the corporation petitioner, and that the facts set forth in the foregoing petition are true to the best of his knowledge, information and belief.

Sworn to and subscribed before me this
——— day of ———, 1921.

JOINDER.

We, the undersigned, being all the parties presently interested in the estate of ———, deceased, hereby acknowledge that we have received notice of the presentation of the foregoing petition and join in the prayer thereof.

In the Orphans' Court of Philadelphia County.

In re Estate of ———, deceased.
——— Term, ———, No. ———.

DECREE.

And Now, to wit, this ——— day of ———, 1921, upon consideration of the annexed petition and on motion of ———, attorneys for the petitioner, it appearing from the facts set forth in the said petition that it would be just and equitable to execute the lease therein set forth, the Court grants the prayer of said petition and authorizes and empowers the ——— Trust Company, Trustee under the will of ———, deceased, to execute a lease of premises (describe them) :

to ———, for the term of ten years to commence and be computed from the ——— day of ———, for the annual rent or sum of \$———, payable monthly in advance in equal payments

of \$——, on the first day of each and every month, said lease to be substantially the same in form as set forth in Exhibit "B" attached hereto, with the same force and effect as though the said lease were made by the beneficial owner or owners and he or they were sui juris and owned the property in fee; security to be entered in the sum of \$——, and the bond of the said —— Trust Company is hereby approved as such security.

By the Court:

J.

**78. PETITION BY TRUSTEE FOR LEAVE TO JOIN
IN THE EXECUTION OF LEASE OF COAL AND
MINERAL RIGHTS FOR A PERIOD EXCEED-
ING FIVE YEARS 497, 624.**

In the Orphans' Court of Schuylkill County.

In the matter of the Estate of ——, deceased.

—— Term, ——, No. ——.

To the Honorable, the Judges of the Said Court:

The petition of The —— Company, ——, and ——, surviving trustees under the will of ——, deceased, respectfully represents:

1. That ——, late of the City of Philadelphia, Pennsylvania, died on the —— day of ——, having first made, published and declared his last will and testament dated ——, duly probated in the office of the Register of Wills of Philadelphia County, a copy of said will being hereto annexed as Exhibit "A."

2. Decedent, by his will (recite terms of trust):

3. (Recite parties in interest.)

4. Among the assets of the residuary estate of the said decedent is an undivided —— interest in a certain tract of coal land known as the ——, situated in —— Township, —— County, Pennsylvania, and an entire interest in another tract of coal land known as the ——, also situated in said township and State.

5. Subject to the approval of your Honorable Court your petitioners have agreed to lease the interest of the said estate in the said coal tracts to the —— Coal Company, a Pennsylvania corporation, for a period exceeding five years upon the

terms and conditions set forth at length in copies of the said leases hereto annexed as Exhibits "B" and "C" respectively.

6. Your petitioners have been advised and believe that it will be to the best interest and advantage of the estate of the said decedent and those financially interested therein that they join with the other parties in interest in the leasing of the ——— Tract and execute and deliver a lease to the ——— Tract, said leases to be substantially similar in form to those hereinabove referred to, copies of which are annexed hereto and have agreed so to do, subject to the approval of your Honorable Court, but under the terms of Sec. 31 of the Fiduciaries Act of 1917, they have no authority to do so without the consent of your Honorable Court first had and obtained.

7. All parties in interest under and by virtue of the terms of the will of the said decedent have received notice of the intended presentation of this petition and have joined in the prayer thereof.

8. Wherefore your petitioners pray your Honorable Court for leave and authority to join with the other parties in interest in the execution of a lease substantially similar in form to that annexed hereto as Exhibit "B", to the ——— Coal Company, covering the ——— Tract in ——— Township, ——— County, Pennsylvania, and to execute and deliver a lease substantially similar in form to that annexed hereto as Exhibit "C" to the ——— Coal Company, covering the ——— Tract in ——— Township, ——— County, Pennsylvania.

And your petitioners will ever pray, etc.

The ——— Company, ———.

By _____

Surviving Trustees under the Will of ———, deceased.

State of _____, County of _____, ss:

——— being duly sworn according to law, deposes and says that he is ——— of the corporation petitioner, and that the facts set forth therein are true to the best of his knowledge, information and belief.

Sworn to and subscribed before me this
——— day of ———, 1920.

JOINDER.

We, the undersigned, being all the parties in interest in the estate of ———, deceased, hereby acknowledge that we have received notice of the intended presentation of the foregoing petition and join in the prayer thereof.

(Signatures.)

DECREE.

And Now, to wit, this ——— day of ———, 192——, upon consideration of the foregoing petition, it appearing that it will be to the interest and advantage of the estate of ———, that the leases hereinafter referred to should be executed and it appearing that the said leases may be made without injury or prejudice to any trust, charity or purpose for which the premises therein let are held and without the violation of any law which may confer an immunity or exemption from sale or alienation, *It is hereby ordered and decreed* that The ——— Company, ——— and ———, surviving trustees under the will of ———, deceased, be and the same are hereby authorized and empowered to join with the other parties in interest in the execution and delivery of a lease substantially similar in form to that annexed hereto to the ——— Coal Company covering the ——— Tract in ——— Township, ——— County, Pennsylvania, and *It is hereby ordered and decreed* that The ——— Company ——— and ——— be and the same are hereby authorized and empowered to execute and deliver a lease substantially similar in form to that annexed hereto to the ——— Coal Company covering the ——— Tract in ——— Township, ——— County, Pennsylvania; security to be entered in the sum of \$———, and the bond of the said The ——— Company ———, is hereby approved as such security.

By the Court:

J.

79. PETITION BY TRUSTEE FOR LEAVE TO PURCHASE REAL ESTATE WITH UNINVESTED PRINCIPAL. 529.

In the Orphans' Court for the County of Philadelphia.

In re Estate of ———, deceased.

——— Term, ———, No. ———.

To the Honorable, the Judges of the Said Court:

The petition of The ——— Company ———, Trustee under the will of ———, deceased, respectfully represents:

1. ——— died on the ——— day of ———, by his will, (a copy of which is attached hereto as Exhibit "A") on the death of his wife ———, and the attaining of his youngest child of the age of twenty-one, he directed (recite terms of trust):

2. (Recite parties in interest.)

3. By adjudication of your Honorable Court dated ———, one-seventh of the fund was set aside to your petitioner in trust under the terms of said will for ———, daughter of the decedent, which fund now amounts to approximately \$——.

4. The said life tenant, ———, is the lessee of premises No. ——— Road, which has been occupied by her as her home for a number of years. She has recently been advised by the owners of said property that it is their intention to sell the same and because of the above facts, has requested your petitioner to purchase the said premises, more particularly hereinafter described, out of the moneys held in its hands as aforesaid for her benefit for life.

5. Your petitioner has, therefore, acting under and by authority of Section 41 (a) 2 of the Fiduciaries Act of 1917, and subject to the approval of your Honorable Court, entered into an agreement to purchase from ———, the owners thereof: (description): for the price or sum of \$—— in cash.

Title to the above premises to be good and marketable, free and clear of all encumbrances, liens, etc., and such as will be insured by the ——— Trust Company of the City of Philadelphia, at their usual rates, subject, nevertheless, to the following conditions and restrictions (recite conditions and restrictions):

6. Your petitioner is informed and believes that the purchase of the said property, in view of the circumstances hereinbefore referred to, will be to the best interest and advantage of the estate of the said ——— for whom your petitioner is Trustee and no change will be made in the course of succession by said investment as regards the heirs and next of kin of the cestui que trust and furthermore, such investment will not be contrary to the provisions contained in the said will.

7. Your petitioner has been assured by two disinterested real estate experts of the City of Philadelphia, familiar with values of

real estate in the vicinity of the premises hereinabove referred to, that the said price of \$—— for the premises herein described, is a fair one and that the same is a just and true valuation thereof and represents its present market value. Their affidavits to this effect are hereto annexed marked respectively Exhibit "B" and Exhibit "C."

8. The said premises are assessed for taxation by the City of Philadelphia in the sum of \$——, as will appear from the certificate by the Board of Revision of Taxes hereto annexed marked Exhibit "D."

9. That the only parties interested as life tenants and in remainder in the said trust are ——, who is living and of full age and his one child to wit: ——, who is living and of full age and has no children. Both of said parties are earnestly desirous that the said sale shall be consummated. They have received notice of the intended presentation of this petition and have joined in the prayer thereof.

Your petitioner, therefore, prays your Honorable Court for leave and authority as trustee under the will of ——, deceased, to purchase and acquire title in fee simple to the premises hereinabove described, known as —— from ——, under and subject to the restrictions hereinabove set forth and upon the execution of a good and sufficient deed for the said premises to pay the said —— the said price or sum of \$——.

And it will ever pray, &c.

*The —— Company ——, Trustee
under the will of ——, deceased.*

By_____

Commonwealth of Pennsylvania,
City and County of Philadelphia, ss:

Personally appeared ——, Trust Officer of said petitioner, who being duly sworn, deposes and says that the statements contained in the foregoing petition are true, to the best of his knowledge, information and belief.

Sworn to and subscribed before me this
—— day of ——, 1919.

JOINDER.

We, the undersigned, being the only parties interested as life tenants and remainderman under the will of ———, deceased, in the trust referred to in the foregoing petition, hereby acknowledge that we have received notice of the intended presentation of the said petition and join in the prayer thereof.

(Signatures.)

EXHIBIT "B."

Philadelphia County, ss:

On this ——— day of ———, 191——, personally appeared before me, ———, who being duly ———, says that he is a real estate broker, residing in the City of Philadelphia; that he has for ——— years been largely interested and engaged in the business of dealing in real estate in the City and County of Philadelphia, in the neighborhood in which the premises described in the foregoing petition are located; that he is familiar with the values of real estate in said locality; that he knows said premises well and that in his opinion the price or sum of \$———, indicated in said petition as being the present value of said premises is a just and true valuation thereof, and that the same in his opinion represents their present market value.

——— to and subscribed before me this
——— day of ———, 1919.

Notary Public.

My commission expires on the ——— day of ———, 1919.

DECREE.

And Now, to wit, this ——— day of ———, 1919, upon consideration of the foregoing petition and on motion of ———, attorneys for the petitioner, *It is hereby ordered and decreed* that the prayer thereof be granted and that The ——— Company ———, Trustee under the will of ———, deceased, for ———, is hereby authorized and empowered to purchase and acquire from ——— a fee simple title in (description):
subject, nevertheless, to the following conditions and restrictions:
(recite conditions and restrictions):
and upon the execution and delivery of a good and sufficient deed

for the said premises to pay to the said ——— therefor, the price or sum of \$——.

By the Court:

J.

80. PETITION BY TRUSTEE FOR LEAVE TO PURCHASE REAL ESTATE REQUIRING AN INVESTMENT OF AN AMOUNT LARGER THAN THAT AUTHORIZED BY THE WILL. 529.

In the Orphans' Court of Philadelphia County.

In re Estate of ———, deceased.

——— Term, ———, No. ———.

To the Honorable, the Judges of the Said Court:

The petition of ———, surviving trustee under the will of ———, deceased, respectfully represents:

1. That ——— died ———, having first made, published and declared her last will and testament dated ——— (copy of which is annexed hereto as Exhibit "A"), duly probated in the office of the Register of Wills of Philadelphia County, on ———, whereunder and whereby she provided *inter alia* as follows: (recite terms of trust):

2. Under said will your petitioner and ——— were appointed trustees. The said ——— died on the ———.

3. The said life tenant is living and intermarried with one ———, and they have but one child, to wit, ———, a minor for whom The ——— Company ———, is guardian.

4. The said ——— has requested your petitioner to purchase for her use as a residence and home, a certain three-story stone ——— dwelling and two-story two-car garage at the corner of ——— Avenue and ——— Avenue, ——— Township, ——— County, Pennsylvania, known and described as follows: (description):

5. The said premises can be purchased for the sum of \$——, payable \$—— in cash and \$—— by the assumption of one or more mortgages in the usual form, bearing interest at the rate of 6 per cent. per annum and due at the expiration of three years.

6. Your petitioner has been assured by two disinterested real estate experts familiar with the value of property in the vicinity

of the premises in question that the said price is a reasonable one and less than would have to be paid at public sale.

7. Your petitioner is informed and believes that the purchase of the said property, in view of the circumstances hereinbefore referred to, will be to the best interest and advantage of the estate of the said ——— for whom your petitioner is trustee, and no change will be made in the course of succession by said investment as regards the heirs and next of kin of the cestui que trust and furthermore, such investment will not be contrary to the provisions contained in the said will.

8. The only parties interested in the said trust as hereinabove set forth, to wit, ——— and The ——— Company ———, Guardian of ———, have received notice of the intended presentation of this petition and have joined in the prayer thereof.

9. While your petitioner has the power under the said will, if the said ——— should desire, that a house should be purchased for herself "to use the funds of her share of the trust estate to an amount not exceeding \$——— for such purchase," and though your petitioner deems it to be advisable to make such purchase, yet under the terms of the will he has not the power to make such purchase incumbered by a mortgage and therefore, having in hand certain moneys, the principal or capital whereof is to remain in his possession and under his control, acting under and by authority of Section 41 (a) 2 of the Fiduciaries Act of 1917, prays your Honorable Court for leave and authority as surviving trustee under the will of ——— (his co-trustee having died as above set forth), to purchase and acquire title in fee simple to the premises hereinabove described under and subject to the restrictions hereinabove set forth and under and subject to a mortgage or mortgages aggregating \$——— in the usual form with interest at 6 per cent. due at the expiration of three years and upon the execution of a good and sufficient deed for the said premises, to pay therefor the said price or sum of \$——— in cash and thereafter to hold title to the same under the uses and trusts and with the powers conferred in and by virtue of the terms of the said will.

And your petitioner will ever pray, &c.

*Surviving Trustee under the Will
of ———, deceased.*

State of ———, County of ———, ss:

——— being duly sworn according to law, deposes and says that he is the surviving trustee under the will of ———, deceased, and that the facts set forth in the foregoing petition are true to the best of his knowledge, information and belief.

Sworn to and subscribed before me this
——— day of ———, 1920.

JOINDER.

We, the undersigned, being the only parties interested as life tenants and remaindermen under the will of ———, deceased, in the trust referred to in the foregoing petition, hereby acknowledge that we have received notice of the intended presentation of the said petition and join in the prayer thereof.

EXHIBIT "B."

——— County, ss:

On this ——— day of ——— 1920, personally appeared before me ———, who being duly ———, says that he is a real estate broker; that he has for ——— years been largely interested and engaged in the business of dealing in real estate in the neighborhood in which the premises described in the foregoing petition are located; that he is familiar with the values of real estate in said locality; that he knows said premises well and that in his opinion the price or sum of \$———, indicated in said petition as being the present value of said premises is a just and true valuation thereof, and that the same in his opinion represents their market value and a less sum than would have to be paid for said premises, provided the same could be sold at public sale.

——— to and subscribed before me this
——— day of ———, 1920.

DECREE.

And Now, to wit, this ——— day of ———, upon consideration of the foregoing petition and on motion of ———, attorneys for the petitioner, *It is hereby ordered and decreed* that the prayer thereof be granted and that ———, surviving trustee under the will of ———, deceased, is hereby authorized and empowered to purchase and acquire a fee simple title in: (description):

and to hold title to the same upon the uses and trusts and with the powers conferred upon him under the will of the said ———, and upon the execution and delivery of a good and sufficient deed for the said premises, to pay therefor the price or sum of \$——— and take title thereto under and subject to one or more mortgages aggregating \$———, due at the expiration of three years with interest at 6 per cent.

By the Court:

J.

**81. PETITION BY CREDITOR FOR CITATION ON
EXECUTOR TO FILE AN ACCOUNT. 539.**

In the Orphans' Court of Philadelphia County.

In re Estate of ———, deceased.

——— Term, ———, No. ———.

To the Honorable, the Judges of the said Court:

The petition of ——— respectfully represents:

1. That ——— died on ———, a resident of Philadelphia County, having first made, published and declared her last will and testament dated the ——— day of ———, duly probated in the office of the Register of Wills of Philadelphia County, on ———, being Will No. ———, duly recorded in Will Book ———, page ———, wherein and whereby the said decedent did appoint her son, ———, of ——— Street, Philadelphia, Executor to whom letters testamentary were duly granted by the said Register on the date aforesaid.

2. As set forth in the petition for letters testamentary the decedent died seized of personal property of the value of \$———, and real estate, to wit: ——— Street, Philadelphia, of a value of \$———.

3. No inventory has been filed by the said Executor, nor has he filed any accounting of his executorship in the office of the Register of Wills as required by law, though repeatedly requested so to do by your petitioner.

4. Your petitioner is an undertaker engaged in business at ——— Street, Philadelphia.

5. Your petitioner, at the request of the said Executor, attended to the burial of the said decedent and there is justly due and

owing to your petitioner a balance of \$—— on account of the cost of said burial.

6. The said Executor, ——, though repeatedly requested so to do by your petitioner has neglected and refused and still neglects and refuses to pay the said balance of \$—— due your petitioner as aforesaid.

Wherefore your petitioner prays your Honorable Court for a citation directed to the said ——, Executor of the estate of ——, deceased, to show cause why he should not forthwith file an account as such Executor in the office of the Register of Wills of Philadelphia County, as required by law.

And your petitioner will ever pray, etc.

State of Pennsylvania,
County of Philadelphia, ss:

—— being duly sworn according to law, deposes and says that he is the petitioner herein and that the facts set forth in the foregoing petition are true and correct to the best of his knowledge, information and belief.

Sworn to and subscribed before me this
—— day of ——, 1921.

In the Orphans' Court of Philadelphia County.
In re Estate of ——, deceased.
—— Term, ——, No. ——.

DECREE.

And Now, to wit, this —— day of ——, 1921, upon consideration of the annexed petition and on motion of ——, attorneys for the petitioner, *It is hereby ordered and decreed* that the prayer thereof be granted and a citation is directed to be issued to ——, Executor of the estate of ——, deceased, to show cause why he should not forthwith file an account as such Executor in the office of the Register of Wills of Philadelphia County, as required by law. Returnable sec. leg.

By the Court:

82. PETITION BY AN ACCOUNTANT FOR THE APPOINTMENT OF AN AUDITOR IN COUNTIES HAVING NO SEPARATE ORPHANS' COURT.
550.

In the Orphans' Court of Delaware County.

In re Estate of ———, deceased.

To the Honorable, the Judges of the Said Court:

The petition of ——— Company ———, Trustee under the will of ———, deceased, respectfully represents:

1. That it is trustee under the will of ———, deceased.
2. That as such trustee it filed its account in your Honorable Court on or about the ——— day of ———.
3. On ———, said account was confirmed nisi and on ——— the said account was confirmed absolutely.
4. Said account shows a balance of principal on hand for distribution amounting to \$—— of principal and \$—— of income.
5. That before distribution can be made, it is necessary for the appointment of an auditor. Wherefore your petitioner prays your Honorable Court to appoint an auditor for the purpose aforesaid.

And your petitioner will ever pray, &c.

By—————

—————
Trustee under the Will of
—————, deceased.

State of Pennsylvania,
County of Philadelphia, ss:

——— being duly sworn according to law, deposes and says that he is ——— of the corporation petitioner and that the facts set forth in the foregoing petition are true to the best of his knowledge, information and belief.

Sworn to and subscribed before me this
——— day of ———, 1920.

DECREE.

And Now, to wit, this ——— day of ———, 1920, upon consideration of the foregoing petition and on motion of ——— and

———, attorneys for the petitioner, the Court appoints ———
Auditor of the estate of ———, deceased.

By the Court:

J.

**83. PETITION TO OPEN AN ADJUDICATION BASED
UPON AN ERRONEOUS STATEMENT OF FACT.
551.**

In the Orphans' Court of Philadelphia County.

In re Estate of ———, deceased.

——— Term, ——— No. ———.

To the Honorable, the Judges of the Said Court:

The petition of the ——— Company ———, Executor of the estate of ———, deceased, respectfully represents:

1. The decedent died ———, having made his last will, a copy of which is annexed hereto as Exhibit "A," duly probated on ———, on which the present letters were granted to your petitioner and leaving to survive him neither widow nor issue.

2. Decedent by his will gave certain specific and pecuniary legacies, all of which have been paid except the legacy to ——— of \$———, and the legacy to the Society ———, of \$———.

3. Under a misapprehension of fact that ——— was living and that the Society ——— was a charitable organization in being and able to take, the first account of your petitioner was duly filed and called for audit before the Honorable ———, President Judge, who filed an adjudication on ———, awarding to ——— the sum of \$———, less tax and plus interest and awarding to the Society ——— the sum of \$———, less tax and plus interest and this error was continued in the schedule of distribution whereby each were awarded the sum of \$———.

4. As a matter of fact ——— predeceased the testator, whereby her legacy lapsed and should have been distributed among the residuary legatees and the Society ——— was never in existence or capable of taking the said legacy.

5. The parties now entitled to the residuary estate of the said decedent are as follows: (list them and show interest):

6. Notice of the intended presentation of this petition has been given to the Attorney General of the Commonwealth of

Pennsylvania and to the Auditor General of the Commonwealth of Pennsylvania, by his local representative, ———, Esq., and their joinder herein is annexed hereto.

Wherefore your petitioner prays that the adjudication of the Honorable ———, dated ———, sur the first account of The ——— Company ———, Executor of the estate of ———, deceased, be opened with respect to the award of \$——, to the Society ——— and the award of \$——, to ———, for the purpose of review and that as thus reopened the same be referred to the Auditing Judge, ——— for a re-audit of the said account as respects the said legacies and distribution of the same to the persons found entitled thereto.

And your petitioner will ever pray, etc.

*The ——— Company ———, Executor of
the Estate of ———, deceased.*

By—————

State of Pennsylvania,
County of Philadelphia, ss:

——— being duly sworn according to law, deposes and says that he is ——— of the corporation petitioner and that the facts set forth in the foregoing petition are true and correct to the best of his knowledge, information and belief.

Sworn to and subscribed before me this
——— day of ———, 1921.

JOINDER.

I, the undersigned, acting herein for the Attorney General of the Commonwealth of Pennsylvania, hereby acknowledge that I have received notice of the intended presentation of the foregoing petition and join in the prayer thereof.

JOINDER.

I, the undersigned, acting herein for the Auditor General of the Commonwealth of Pennsylvania, hereby acknowledge that I have received notice of the intended presentation of the foregoing petition and join in the prayer thereof.

In the Orphans' Court of Philadelphia County.

In re Estate of ———, deceased.

——— Term, ———, No. ———.

DECREE.

And Now, to wit, this ——— day of ———, 1921, upon consideration of the annexed petition and on motion of ———, attorneys for the petitioner, *It is hereby ordered and decreed* that the prayer thereof be granted and that the adjudication of the Honorable ———, dated ———, sur the first account of The ——— Company ———, Executor of the estate of ———, deceased, be opened with respect to the award of \$——— to the Society ———, and the award of \$——— to ——— for the purpose of review and that as thus reopened the same be referred to the Auditing Judge, ———, for a re-audit of the said account as respects the said legacies and distribution of the same to the persons found entitled thereto.

By the Court :

J.

84. PETITION FOR THE REVIEW OF AN ADJUDICATION BY A KNOWN CREDITOR WHO WAS GIVEN NO NOTICE OF AUDIT. 551

In the Orphans' Court, County of Philadelphia.

In re Estate of ———, deceased.

——— Term, ———, No. ———.

To the Honorable, the Judges of the Said Court:

Petition of ———, Executrix of the estate of ———, deceased, respectfully represents :

1. That ———, late of the City and County of Philadelphia, died on the ——— day of ———, having first made and published his last will and testament dated ———, duly probated in the office of the Register of Wills in and for the County of Philadelphia, on ———, and recorded in Will Book No. ———, Page ———, &c., wherein and whereby he appointed ———, Executor and Trustee.

2. The said ———, on the ——— day of ———, renounced his right to act as such executor, whereupon letters of adminis-

tration cum testamento annexo were issued to ——— and ———. ——— died on the ——— day of ———.

3. By the terms of the said will his entire estate was devised and bequeathed to the testamentary trustee ——— to pay one-third of the income to testator's wife: ———, for life, two-thirds for the maintenance and support of his children, and on the death of the wife and when the youngest child should reach the age of twenty-one, the principal to be divided equally among his children then living or the issue of those deceased, per stirpes, with the power in the executor or trustee to sell or mortgage the real estate, &c. (Here list parties in interest.)

4. ———, surviving administrator c. t. a., filed his first account after citation and the same came up for audit before the Honorable ——— on ——— and ———. At the audit ——— appeared for the accountant. By his adjudication the learned Auditing Judge awarded the balance of personalty \$——, to ———, Trustee under the will for the uses and purposes therein set forth. This sum was reduced by the amount of \$—— at a subsequent audit ———, leaving a net balance of \$——, and on ——— said account was confirmed absolutely.

5. ——— on the ——— day of ———, executed and delivered to ———, surviving trustee under the will of ———, deceased, his certain bond in the penal sum of \$—— to secure the payment of \$—— at the expiration of one year from the date thereof, with interest thereon, payable half-yearly at six per cent. per annum, secured by a mortgage recorded at Philadelphia, in Mortgage Book ——— Page ———, covering ——— acres and ——— perches of ground on the ——— side of ——— Road, south of ——— Road in the ——— ward of the City of Philadelphia.

6. By sundry mesne assignments the last of which was recorded in the assignment of mortgage book ———, Page ———, the said bond and mortgage were assigned to ——— and were owned by him and in his possession at the time of his death.

7. The said ——— died on the ——— day of ———, having first made, published and declared his last will and testament wherein and whereby he appointed your petitioner, executrix, and letters testamentary were issued thereon by the Register of Wills of the County of Philadelphia, on the ——— day of ———, and have not since been revoked.

8. The said bond in the sum of \$—— was a valid and subsisting debt of the decedent at the time of his death, and at the time of the above audit, with interest at 6 per cent. from —— to date.

9. The —— Company ——, has for many years last past and is at this date, acting as attorney in fact for the owner of said bond and mortgage, in the collection of interest thereon.

10. —— surviving administrator c. t. a., was thoroughly familiar with this bond and mortgage as shown in his account signed and sworn to on ——, wherein under dates of ——, he claims credit for payment "To —— Company six months' interest on mortgage \$—— Road, \$—— and charges himself in said account with rent received from said property in the sum of \$——.

11. The said ——, surviving administrator c. t. a., in his petition for distribution signed and sworn to on the —— day of ——, recites as follows:

"The unpaid claims of all creditors of which the accountant has notice or knowledge, with the amounts of such claims and whether or not they are admitted to be correct are as hereinafter set forth; said creditors have received notice of this audit."

and followed it with the names of no creditors whatever.

12. No notice whatever of the filing of the account of the said ——, surviving administrator c. t. a., or of the audit thereof, was given to the said —— nor to the petitioner, his Executrix, not to the —— Company ——, Agent, and said account was filed and audited, and distribution decreed entirely without the knowledge of any of them. Whereby grave injustice and irreparable loss has been worked upon your petitioner if the same be not remedied.

13. That the only persons affected by this petition are: ——.

14. Therefore your petitioner prays that a citation be awarded directed to ——, commanding them and each of them to appear, and to show cause why the decree of confirmation of the said account, in so far as the rights of your petitioner are concerned, should not be vacated, set aside, opened, reviewed and corrected, and why such order of restitution on the parties concerned and such other relief in the premises as may be meet should not be decreed to her.

And your petitioner will ever pray, &c.

Executrix of the Estate of ———,
Deceased.

Commonwealth of Pennsylvania,
City and County of Philadelphia, ss:

———, being duly sworn according to law, deposes and says the facts set forth in the foregoing petition are true and correct to the best of her knowledge, information and belief.

Sworn to and subscribed before me this
——— day of ———, 1919.

——— *Notary Public.*

My commission expires ———.

And Now, to wit, this ——— day of ———, 1919, on consideration of the foregoing petition on motion of ———, attorneys for the petitioner, *It is hereby ordered and decreed* that the prayer thereof be granted, and that a citation be issued directed to ———, same being all the parties in interest, to appear and show cause why the decree of confirmation of the said account of ———, surviving administrator c. t. a., of the estate of ———, deceased, on ———, should not be vacated, set aside, opened, reviewed and corrected in so far as the rights of the petitioner are concerned, and to show cause why such an order of restitution on the parties concerned and such other relief in the premises as may be meet, should not be decreed to her.

Returnable sec. leg.

J.

85. PETITION FOR THE DISTRIBUTION OF AN ESTATE NOT EXCEEDING THREE HUNDRED DOLLARS. 554.

In the Orphans' Court of Philadelphia County.
In re Estate of ———, deceased.
——— Term, ———, No. ———.

PETITION FOR APPROVAL OF AN ACCOUNT OF AN
ESTATE LESS THAN THREE HUNDRED DOLLARS
UNDER SECTION 49 (c) OF THE FIDU-
CIARIES ACT OF 1917.

To the Honorable, the Judges of the Said Court:

The petition of ——— respectfully represents:

1. ——— died a resident of Philadelphia County, on the ——— day of ———, intestate and without issue, leaving to survive her your petitioner, her husband, as her sole heir and next of kin.

2. Letters of administration were granted to your petitioner by the Register of Wills of Philadelphia County, on the ——— day of ———, and a bond was duly filed by your petitioner as such administrator, wherein the ——— Company of ———, is surety.

3. That your petitioner has prepared and herewith submits annexed hereto his first and final account as such administrator.

4. That all the debts of the decedent have been paid in full and your petitioner has no knowledge of any credits. Your petitioner paid the funeral bill of the said decedent to ———, ——— Avenue, Philadelphia, in the sum of \$——— on the ——— day of ———.

5. That the only person interested in this estate other than your petitioner is the surety on his bond, to wit: ——— Company, of ———, which company has received notice of the intended presentation of this petition and has joined in the prayer thereof.

Wherefore your petitioner prays that the said account may be approved, your petitioner discharged as administrator and his surety released from future liability on the said bond as provided by Section 49 (c), of the Fiduciaries Act of 1917.

And your petitioner will ever pray, etc.

State of Pennsylvania,
County of Philadelphia, ss:

——— being duly sworn according to law, deposes and says that he is the petitioner herein and that the facts set forth in the

foregoing petition are true to the best of his knowledge, information and belief.

Sworn to and subscribed before me this
 _____ day of _____, 1921.

JOINDER.

The undersigned, being the only party in interest, other than _____, hereby acknowledges that it has received notice of the intended presentation of the foregoing petition and joins in the prayer thereof.

(Signature.)

DECREE.

And Now, to wit, this _____ day of _____, 1921, upon consideration of the foregoing petition and the annexed account and on motion of _____, attorneys for the petitioner, it appearing that said account has been duly verified, all parties in interest having acknowledged receipt of notice of the filing of this petition, *It is hereby ordered, adjudged and decreed* that _____, Administrator of the estate of _____, deceased, be discharged as such administrator at the expiration of thirty days from the date of this decree and that the _____ Surety Company of _____, be released from future liability on the bond of the said administrator, unless during said period of thirty days exceptions be filed to the account.

By the Court:

J.

86. PETITION FOR THE DISCHARGE OF AN EXECUTOR. 563.

In the Orphans' Court of Philadelphia County.

In re Estate of _____, deceased.

_____ Term, _____, No. _____.

To the Honorable, the Judges of the Said Court:

The petition of _____, one of the executors of the above estate respectfully represents:

1. That _____ died _____, having first made her last will and codicil thereto, duly probated _____, in which she appointed

your petitioner and ——— Trust Company, executors, and Let-
ters Testamentary were duly granted to them.

2. On the ——— day of ———, the said executors filed their
first account and on the ——— day of ———, their second ac-
count which came up for audit and were duly adjudicated on
——— and ———, respectively, and since confirmed absolutely.

3. That the entire estate has been paid and transferred to the
parties entitled thereto.

4. That no other money or property belonging to the estate has
been received by your petitioner since the adjudication of the
account.

5. That the only parties in interest are: ———.

——— Trust Company, co-executor and all of said parties in
interest join in this petition.

Wherefore your petitioner prays that he may be discharged
as co-executor of the estate of ———, deceased.

And your petitioner will ever pray, etc.

County of Philadelphia, ss:

——— being duly sworn according to law, deposes and says
that the facts set forth in the foregoing petition are true to the
best of his knowledge, information and belief.

Sworn to and subscribed before me this

——— day of ———, 1919.

JOINDER.

We, the undersigned, being all the parties in interest in the
estate of ———, either as distributees or otherwise, hereby
acknowledge that we have received notice of the intended presen-
tation of the foregoing petition and join in the prayer thereof.

(Signatures.)

DECREE.

And Now, to wit, this ——— day of ———, 1919, upon con-
sideration of the foregoing petition and on motion of ———,
attorneys for petitioner, ———, is hereby discharged as executor
of the estate of ———, deceased.

By the Court:

J. .

87. PETITION FOR DISCHARGE OF ANCILLARY EXECUTOR. 563.

In the Orphans' Court of Philadelphia County.

In the matter of the Estate of ———, deceased.

——— Term, ———, No. ———.

To the Honorable, the Judges of the Said Court:

The petition of ——— respectfully represents:

1. That your petitioner is ancillary executor of the estate of ———, who died on ———, in ——— County, New York, ancillary letters testamentary having been granted to your petitioner by the Register of Wills of Philadelphia County, on ———.

2. That your petitioner duly filed his first and final account in the office of the Register of Wills of Philadelphia County, and the same was called for audit before your Honorable Court on the ——— day of ———. Said account was confirmed nisi by adjudication dated ———, and supplemental adjudication dated ———, has since been confirmed absolutely.

3. That the sole party in interest and sole distributee under the said adjudication is ———, executor at the domicile of the said decedent who has filed his receipt and release for the entire balance of the account in the office of the Clerk of the Orphans' Court of Philadelphia County.

4. The ——— Trust Company is surety on the bond of the said ancillary executor.

5. The said executor at the domicile and the said surety are the only parties interested in this petition. They have received notice of its intended presentation and have joined in the prayer hereof.

Wherefore your petitioner prays that he may be discharged as ancillary executor of the estate of ———, deceased, and the ——— Trust Company, surety on his bond, released from future liability thereon.

And your petitioner will ever pray, etc.

State of ———, County of ———, ss:

——— being duly sworn according to law, deposes and says that he is the petitioner herein and that the facts set forth in the

foregoing petition are true and correct to the best of his knowledge, information and belief.

Sworn to and subscribed before me this
 _____ day of _____, 1921.

JOINDER.

We, the undersigned, being the only parties interested in the estate of _____, deceased, hereby acknowledge that we have received notice of the intended presentation of the foregoing petition and join in the prayer thereof.

Executor at the domicile of _____,
deceased.

_____ TRUST COMPANY.

By _____
Surety.

In the Orphans' Court of Philadelphia County.
 In the matter of the Estate of _____, deceased.
 _____ Term, _____, No. _____.

DECREE.

And Now, to wit, this _____ day of _____, 1921, upon consideration of the annexed petition and on motion of _____, attorneys for the petitioner, *It is hereby ordered and decreed* that the prayer thereof be granted and _____, ancillary executor of the estate of _____, deceased, is hereby discharged as such ancillary executor and _____ Trust Company, surety on his bond, is hereby discharged from future liability thereon.

By the Court:

 J.

88. PETITION FOR DISCHARGE OF ADMINISTRATOR D. B. N. C. T. A. 563.

In the Orphans' Court of Philadelphia County.
 In the matter of the Estate of _____, deceased.
 _____ Term, _____, No. _____.

To the Honorable, the Judges of the Said Court:

The petition of ———, administrator d. b. n. c. t. a., of the estate of ———, deceased, respectfully represents:

1. Your petitioner duly filed his final account before your Honorable Court and the same came up for audit before the Honorable ———, and for supplemental audit before the Honorable ———, and by an adjudication filed by Judge ——— on ———, the entire balance in the hands of your accountant was awarded to ———, executors of the estate of ———, deceased, and the said balance was turned over to the said trustees and their release and satisfaction of award duly filed on the ——— day of ———.

2. Since the said adjudication no money or other property of the decedent has come into the hands of your petitioner.

3. All of said parties in interest and the ——— Trust Company, surety on the bond of your petitioner, have received notice of the intended presentation of this petition and have joined in the prayer thereof.

Wherefore your petitioner prays that he may be discharged as such administrator and his surety released from future liability.

And your petitioner will ever pray, &c.

*Administrator d. b. n. c. t. a. of the
Estate of ———, deceased.*

State of ———, County of ———, ss:

——— being duly sworn according to law, deposes and says that he is administrator d. b. n. c. t. a., of the estate of ———, deceased, and that the facts set forth in the foregoing petition are true to the best of his knowledge, information and belief.

Sworn to and subscribed before me this
——— day of ———, 19——.

JOINDER.

We, the undersigned, being all the parties in interest in the estate of ———, deceased, and The ——— Trust Company, surety on the bond of the administrator of the estate of the said decedent, hereby acknowledge that we have received notice of

the intended presentation of the foregoing petition and join in the prayer thereof.

(Signatures.)

DECREE.

And Now, to wit, this ——— day of ———, 1920, upon consideration of the foregoing petition and on motion of ———, attorneys for the petitioner, ———, is hereby discharged as administrator d. b. n. c. t. a., of the estate of ———, deceased, and the ——— Trust Company, surety on his bond as such administrator is hereby released from future liability on said bond.

By the Court:

J.

89. PETITION FOR THE DISCHARGE OF THE GUARDIAN OF THE ESTATE OF A MINOR. 563.

In the Orphans' Court of Montgomery County.

In re Estate of ———, late a minor.

To the Honorable,—

President Judge of Said Court:

The petition of ———, Guardian of the estate of ———, late a minor, respectfully represents:

1. Your petitioner duly filed his first and final account in your Honorable Court and the same was examined and audited on the first day of ———, and confirmed nisi on ———, and since confirmed absolutely.

2. Under the terms of the said adjudication the balance for distribution as shown by the account, to wit, \$———, was awarded to the said ———, and the same has been paid over and distributed to her and her receipt therefor filed of record.

3. No money or other property has come into the hands of your accountant since the filing of the said account.

4. All parties in interest have received notice of the intended presentation of this petition and join in the prayer thereof.

Wherefore your petitioner prays that he may be discharged as Guardian of the said ———, late a minor, and his surety released from future liability on his bond.

And your petitioner will ever pray, &c.

County of Philadelphia, ss:

———, being duly sworn according to law, deposes and says that the facts set forth in the foregoing petition are true to the best of his knowledge, information and belief.

Sworn to and subscribed before me this
——— day of ———, 19——.

JOINDER.

We, the undersigned, being the sole distributee mentioned in the foregoing petition and the surety on the bond of the said Guardian, hereby acknowledge that we have received notice of the intended presentation of the foregoing petition and join in the prayer thereof.

(Signatures.)

DECREE.

And Now, to wit, this ——— day of ———, upon consideration of the foregoing petition and on motion of ———, attorneys for petitioner, *It is hereby ordered and decreed* that ——— be and he is hereby discharged as guardian of the estate of ———, late a minor, and ———, the surety on said Guardians' bond is hereby discharged from future liability thereon.

90. PETITION FOR THE DISCHARGE OF SURETY ON THE BOND OF A TRUSTEE. 563.

In the Orphans' Court of Philadelphia County.

Estate of ———, deceased.

——— Term, ———, No. ———.

To the Honorable, the Judges of the Said Court:

The petition of ———, Trustee, respectfully represents:

1. On or about the ——— day of ———, your petitioner filed in your Honorable Court her account of one-fourth of the net proceeds of the sale of ———, which was a portion of the residuary estate of the above decedent.

2. That by adjudication of your Honorable Court on the ———, sur said account, the same was approved, and the balance shown thereby, to wit: \$——— was distributed and awarded equally between ——— and ———.

3. That the said fund has been distributed to the said parties entitled thereto, and their receipt and release taken therefor, and filed of record in your Honorable Court.

4. On or about ———, your petitioner filed her bond in connection with the above matter, in the sum of \$———, wherein the ——— Trust Company is surety.

5. All parties in interest as herein set forth, including the said distributees and surety, have joined in the prayer of this petition.

Wherefore your petitioner prays that the said ——— Trust Company be discharged as surety on said bond.

And your petitioner will ever pray, etc.

State of ———, County of ———, ss:

———, being duly sworn according to law, deposes and says that she is the petitioner named in the foregoing petition, and that the facts set forth therein are true to the best of her knowledge, information and belief.

Sworn and subscribed to before me this
——— day of ———, 1919.

JOINDER.

I, the undersigned, having received my full share of the proceeds of the sale of ———, from ———, Trustee under the will of ———, deceased, do hereby acknowledge that I have received notice of the intended presentation of the petition for the discharge of the surety of the said Trustee, and do hereby join in the prayer thereof.

The ——— Trust Company, the surety named in the foregoing petition, hereby acknowledges that it has received notice of the intended presentation of the foregoing petition, and joins in the prayer thereof.

——— TRUST COMPANY,

By —————

DECREE.

And Now, to wit, this ——— day of ———, 1919, upon consideration of the foregoing petition, and upon motion of ———,

attorneys for petitioner, the Court grants the prayer thereof, and the ——— Trust Company, surety on the bond of ———, Trustee under the will of ———, deceased, in the matter of the proceeds of the sale of ———, is hereby discharged from future liability on said bond.

By the Court:

J.

91. PETITION FOR THE APPOINTMENT OF A SUBSTITUTED TRUSTEE ON THE RESIGNATION OF A TRUSTEE. 584.

In the Orphans' Court of Philadelphia County.

In re Estate of ———, deceased.

——— Term, ———, No. ———.

To the Honorable, the Judges of the Said Court:

The petition of ———, Surviving Trustee, respectfully represents:

1. Decedent died ———, having made his last will and testament, duly probated in the office of the Register of Wills of Philadelphia County, on ———, copy of said will being hereto annexed as Exhibit "A."

2. By said will he appointed ——— and ——— as Trustees for ———. The said ——— died on ———, so that your petitioner is sole surviving trustee.

3. Decedent by his will gave one-twelfth of his estate to said trustees and the survivor of them (recite terms of trust):

4. The said ——— is unmarried and has no issue. Her heirs interested in remainder, provided she makes no appointment of the trust fund by her will and dies without issue, are ———, a brother, ———, your petitioner, a brother and ———, and ———, nephews, children of a deceased brother. All of said parties as above set forth are living and of full age. They have received notice of the intended presentation of this petition and have joined in the prayer thereof.

5. Your petitioner as surviving trustee has filed his account in your Honorable Court and the same was called for audit before ——— on ———, and was confirmed nisi in an adjudication filed ———, and absolutely on the ———.

6. By said adjudication, a copy of which is annexed hereto as Exhibit "B," it is decreed inter alia that the balance of principal composed as therein set forth "is awarded to the incoming trustee and payment and distribution is so decreed with leave to make any and all necessary assignments and transfers when he shall have been appointed and qualified."

7. Your petitioner being desirous of relinquishing his office as Surviving Trustee, has resigned as such to take effect upon the appointment and qualification of his successor.

8. All parties in interest have agreed upon the selection of the _____ Trust Company as Substituted Trustee of this estate and the said company has accepted the trust, subject to the approval of your Honorable Court.

Wherefore your petitioner prays that _____ Trust Company be appointed Substituted Trustee for _____ under the will of _____ in place of _____, surviving Trustee who has resigned.

And your petitioner will ever pray, etc.

*Surviving Trustee of the Estate
of _____, deceased.*

State of _____, County of _____, ss:

_____, being duly sworn according to law, deposes and says that he is Surviving Trustee of the estate of _____, deceased, and that the facts set forth in the foregoing petition are true to the best of his knowledge, information and belief.

Sworn to and subscribed before me this
_____ day of _____, 1920.

JOINDER.

We, the undersigned, being the only parties interested in the estate of _____, deceased; hereby acknowledge that we have received notice of the intended presentation of the foregoing petition and join in the prayer thereof.

(Signatures.)

DECREE.

And Now, to wit, this _____ day of _____, 1920, upon consideration of the foregoing petition and on motion of _____,

attorney for the petitioner, *It is hereby ordered and decreed* that the prayer thereof be granted and ——— Trust Company is appointed Substituted Trustee for ——— under the will of ——— in place of ———, surviving trustee who has resigned; security to be entered in the sum of \$——, and the bond of the ——— Trust Company is hereby approved as such security.

By the Court:

J.

**92. PETITION FOR THE DISCHARGE OF TRUSTEE
AND APPOINTMENT OF SUBSTITUTED TRUS-
TEE ON THE RESIGNATION OF THE FORMER.**

584.

In the Orphans' Court of Philadelphia County.

In the matter of the Estate of ———, deceased.

——— Term, ———, No. ———.

To the Honorable, the Judges of the Said Court:

The petition of ———, respectfully represents:

1. That ——— died on the ——— day of ———, a resident of Philadelphia County, having first made, published and declared his last will and testament and codicil thereto dated ———, both duly probated in the office of the Register of Wills of Philadelphia County, a copy thereof being hereto annexed as Exhibit "A."

2. By paragraph ——— of his will the decedent provided: (recite terms of trust):

3. The decedent nominated ——— and ——— as Executors and Trustees. ——— was discharged on ———. ——— died on ———. ——— died on ———, and ——— and ——— were appointed as substituted Trustees inter alia for your petitioner under the will of the above decedent by decree of your Honorable Court dated ———, security to be entered in the sum of \$——, which security was duly entered by the ——— Company of ———.

4. The said substituted Trustees desiring to be discharged, filed their first and final account in the office of the Clerk of the Orphans' Court and the same was called for audit before ———, J., on ———, and the account was confirmed nisi on ———, and

confirmed absolutely on ———, a copy of such adjudication is hereto annexed as Exhibit "B."

5. The balance shown by the account is \$———, composed as follows: ———, which balance composed as in the account stated was awarded in the said adjudication to a trustee to be appointed for the purpose of the trust.

6. The said ———, life tenant upon the decease of your petitioner, is living and of full age and has two children, to wit: ——— and ———, both living and of full age and no issue of deceased children. The same are all the parties interested in this proceeding. They have received notice of the intended presentation of this petition and have joined in the prayer thereof.

7. Subject to the approval of your Honorable Court and with the consent of all the parties in interest your petitioner desires the appointment of the ——— Trust Company as substituted Trustee and by joinder hereto attached the present Trustees have resigned, subject to the appointment of the said ——— Trust Company, and the latter has accepted the trust subject to the approval of your Honorable Court.

Wherefore your petitioner prays that ——— Trust Company be appointed substituted Trustee under the will of ———, deceased, for ——— in lieu of ———, and ——— resigned.

And your petitioner will ever pray, &c.

State of ———, County of ———, ss:

———, being duly sworn according to law, deposes and says that she is the petitioner herein and that the facts set forth in the foregoing petition are true and correct to the best of her knowledge, information and belief.

Sworn to and subscribed before me this
——— day of ———, 1921.

JOINDER.

We, the undersigned, being the succeeding life tenants and remaindermen under the trust set forth in the foregoing petition and as such, together with the parties who have joined therein, all the parties interested in said petition, hereby acknowledge that

we have received notice of the intended presentation of the said petition to the Orphans' Court of Philadelphia County, and join in the prayer thereof.

(Signatures.)

JOINDER.

We, the undersigned, —— and ——, substituted Trustees under the will of ——, deceased, for ——, hereby acknowledge that we have received notice of the intended presentation of the foregoing petition. We hereby resign as such substituted Trustees subject to the appointment of the —— Trust Company as our successor, said resignation to take effect and be effective upon the appointment of the said succeeding Trustee and the transfer of the trust estate to it and the execution and delivery by it of a receipt and release therefor.

(Signatures.)

JOINDER.

—— Trust Company, suggested in the foregoing petition as substituted Trustee under the will of ——, for ——, hereby acknowledges that it has received notice of the intended presentation of the foregoing petition and accepts the appointment of substituted Trustee subject to the approval of the Orphans' Court of Philadelphia County.

—— TRUST COMPANY,

By _____

In the Orphans' Court of Philadelphia County.

In the matter of the Estate of ——, deceased.

—— Term, ——, No. ——.

DECREE.

And Now, to wit this —— day of ——, 1921, upon consideration of the annexed petition and on motion of ——, attorneys for the petitioner, —— and ——, are hereby discharged as substituted Trustees for ——, under the will of ——, deceased; conditioned, however, upon the transfer and delivery of the assets of the estate in accordance with the adjudication of ——, and —— Trust Company is appointed sub-

stituted Trustee for ——— under the will of ———, deceased, in place of the said ——— and ———, resigned, security to be entered in the sum of \$———, and the bond of the said ——— Trust Company is hereby approved as such security.

By the Court :

J.

93. CERTIFICATE AND AFFIDAVIT BY FOREIGN FIDUCIARY ENTITLED TO AN AWARD IN DISTRIBUTION. 595.

In the Orphans' Court of Philadelphia County.

In re Estate of ———, deceased.

——— Term, ———, No. ———.

AFFIDAVIT UNDER SECTION 58 (f) OF THE FIDUCIARIES ACT OF 1917.

———, being duly sworn according to law, deposes and says :

1. He is the executor of the estate of ———, deceased, under probate dated ———, in His Majesty's High Court of Justice in the District Probate Registry, at ———, England.

2. As such he is duly authorized and empowered to receive all property belonging to the estate of ———, deceased.

3. That by the adjudication of the Orphans' Court of Philadelphia County, in the estate of ———, deceased, dated ———, there is distributable to him one-twelfth of the net estate of the said decedent, subject to compliance with Section 58 (f) of the Fiduciaries Act of 1917.

4. That there are no creditors of the estate of ——— in the Commonwealth of Pennsylvania.

5. That this affidavit is made in compliance with the requirements of Section 58 (f) of the Fiduciaries Act of 1917.

And further deponent saith not.

Sworn to and subscribed before me this

——— day of ———, 1920.

**94. PETITION FOR THE APPOINTMENT OF A
GUARDIAN FOR THE ESTATE OF A MINOR
UNDER THE AGE OF 14 YEARS. 599.**

In the Orphans' Court of Philadelphia County.

In the matter of the Estate of Mary Doe, a minor.

——— Term, ———, No. ———.

To the Honorable, the Judges of the Said Court:

The petition of Mary Doe, by her father and next friend, George Doe, respectfully represents:

1. That your petitioner is the daughter of George Doe and Sarah Doe, the latter of whom is now deceased.

2. That your petitioner resides with her father in Detroit, Michigan.

3. That your petitioner was born on the ——— day of ———, and is now over ——— years of age.

4. That your petitioner is the only child of Sarah Doe, who died intestate on ———, leaving to survive her, her husband, George Doe, and your petitioner as her only heirs and next of kin, whereby your petitioner became seized of an undivided one-half interest in fee of premises ——— Street, Philadelphia, valued at \$———.

5. That proceedings are about to be had before your Honorable Court for the sale of said property at private sale in which proceedings it is necessary that your petitioner be represented by guardian to receive and receipt for her share of the purchase money and act for her in the conveyance of such property.

6. That your petitioner has no such guardian in this jurisdiction and requests that your Honorable Court appoint The Acme Trust Company, as guardian for the purpose aforesaid.

And your petitioner will ever pray, etc.

MARY DOE,

By _____

Her father and next friend.

State of Michigan, County ———, ss:

George Doe, being duly sworn according to law, deposes and says that he is the father of Mary Doe, the minor described in the foregoing petition; that he is familiar with the facts set forth herein and that the same are true to the best of his knowledge,

information and belief; that The Acme Trust Company ———, suggested as guardian, is a corporation of respectability and property in which the interests of the said minor may be safely entrusted; that it is neither executor, administrator or trustee of any estate in which the said minor has an interest, nor surety on the bond of any such fiduciary.

Sworn to and subscribed before me this
 ——— day of ———, 1921.

In the Orphans' Court of Philadelphia County.
 In the matter of the Estate of Mary Doe, a minor.
 ——— Term, ———, No. ———.

DECREE.

And Now, to wit, this ——— day of ———, 1921, upon consideration of the annexed petition and on motion of ———, attorney for the petitioner, The Acme Trust Company, is hereby appointed guardian for Mary Doe, a minor.

By the Court:

J.

95. PETITION FOR THE APPOINTMENT OF A GUARDIAN FOR THE ESTATE OF A MINOR OVER THE AGE OF 14 YEARS. 599.

In the Orphans' Court of Philadelphia County.
 In the matter of the Estate of Harry Doe, a minor.
 ——— Term, 1921, No. ———.

To the Honorable, the Judges of the Said Court:

The petition of Harry Doe, respectfully represents:

1. That he is the son of Anna Doe and Harry B. Doe, both of whom are living.
2. That he resides with his parents at ——— Avenue, Philadelphia, Pennsylvania.
3. That he was born on the ——— day of ———, and is now over fourteen years of age.
4. Under the will of ———, who died in ———, 1920, your petitioner is entitled to a legacy of \$———, and one-third of the

residuary estate of the said decedent, which one-third share amounts to approximately \$———. That in order to receive said legacy and said share of the residuary estate it is necessary that your petitioner have a guardian appointed to accept and receipt therefor.

5. That your petitioner has no such guardian and therefore requests your Honorable Court to appoint The Acme Trust Company, as guardian of his estate as aforesaid.

And your petitioner will ever pray, etc.

State of Pennsylvania,
County of Philadelphia, ss:

Harry Doe being duly sworn according to law, deposes and says that he is the petitioner herein and that the facts set forth in the foregoing petition are true to the best of his knowledge, information and belief.

Sworn to and subscribed before me this
—— day of ——, 1921.

State of Pennsylvania,
County of Philadelphia, ss:

Harry B. Doe being duly sworn according to law, deposes and says that he is the father of the minor mentioned in the foregoing petition and that the facts set forth therein are true and correct to the best of his knowledge, information and belief; that he is well acquainted with the said minor's affairs and that The Acme Trust Company, suggested as guardian is a corporation of respectability and property to whom the estate of the said minor can be safely entrusted, and that it is neither Executor, Administrator nor Trustee of any estate in which the said minor has an interest, nor surety on the bond of any such fiduciary.

Sworn to and subscribed before me this
—— day of ——, 1921.

JOINDER.

I, the undersigned, mother of the minor, Harry Doe, hereby acknowledge that I have received notice of the intended presentation of the foregoing petition and join in the prayer thereof.

In the Orphans' Court of Philadelphia County.

In the matter of the Estate of Harry Doe, a minor.

—— Term, 1921, No. ——.

DECREE.

And Now, to wit, this —— day of ——, 1921, upon consideration of the annexed petition and on motion of ——, attorney for the petitioner, The Acme Trust Company, is appointed Guardian of the estate of Harry Doe, a minor.

By the Court:

J.

**96. PETITION BY GUARDIAN FOR LEAVE TO PAY
MOTHER OF MINOR INCOME AND PORTION
OF PRINCIPAL FOR SUPPORT. 607.**

In the Orphans' Court of Delaware County.

In the matter of the Estate of ——, a minor.

—— Term, ——, No. ——.

PETITION FOR LEAVE TO PAY.

To the Honorable, the Judges of the Said Court:

The petition of the —— Trust Company, Guardian of the estate of ——, a minor, respectfully represents:

1. That —— died ——, a resident of Philadelphia County, having first made, published and declared his last will and testament, duly probated in the office of the Register of Wills of Philadelphia County.

2. That in and by his said will the decedent nominated, constituted and appointed the —— Trust Company, testamentary guardian of the minor children of his late son, ——, deceased, and the said —— Trust Company has since been appointed

guardian of the estates of the said minors by decree of your Honorable Court dated ____.

3. That ____ is the widow of the said ____ and the mother of his children.

4. That the said ____ left him surviving ____ children, to wit: ____, the latter three of whom are minors of whose estates the ____ Trust Company as aforesaid is guardian.

5. That the said ____ Trust Company as guardian of each minor is entitled to ____ a ____ share of the residuary estate of the above decedent which said ____ share amounts to \$____, and the said guardian is also entitled to the same share of the real estate of the said decedent, to wit: ____ Street, which has been sold for \$____, and a ground rent on ____ Street, which has been sold for \$____, so that out of the proceeds of the sale of the said real estate and ground rent the said ____ Trust Company as guardian for each minor will receive approximately \$____, so that it will have a total fund for the benefit of each of the said three minors of \$____, and from which the estimated net annual income will amount to approximately \$____. The said guardian has income on hand and accumulated since the death of the said decedent of approximately \$____ for each of said minors.

6. Neither the said minors nor their mother have any income other than that derived as aforesaid from their grandfather's estate.

7. That the said ____ is now pursuing a course of education at the ____ University at ____, wherein the annual expense amounts to \$____ per year, being \$____ for tuition, \$____ for room rent, heat and light, \$____ for car fares, books, incidental and laboratory fees, \$____ for board and \$____ for clothing.

8. That ____, mother of the said minors, and her five children, among whom is the said ____, all reside together in a family home and residence maintained for the family at ____, Pennsylvania, in maintaining which the following fixed charges per year must be paid, to wit: interest on \$____; taxes, \$____; coal, \$____; repairs, \$____; gas, water and electric light, \$____ or a total of \$____, of which expense each of said minors should properly bear a ____ share or \$____.

9. That ———, the mother of the minor, in order to support, maintain and educate him commensurate with his station in life and in a manner compatible with his maintenance prior to the death of his father, has and is expending annually for him the sum of \$———, exclusive of numerous incidental expenses incurred from time to time for doctors' and dentists' bills and proper disbursements for amusements and recreation of the said minor. This expense has been continuous since the date of the death of the father of the said minor, ———, on ———, and the date of the death of the said ——— on ———.

10. Since the death of the said ———, the said ——— has expended for the support, maintenance and education of the said minor the sum of \$———. During the same period, owing to the fact that the greater portion of the minor's estate consists of cash received ——— on ———, very little income has been received by the said guardian. The income thus received during this period amounts only to the sum of \$———, leaving a deficit of \$———, payment of which is desired by the mother of the minor out of the corpus of the estate of the said minor in the hands of the said guardian.

11. The said ———, mother of the minor, as before stated, has no source of income from which to pay the aforesaid necessary expenses for the support, maintenance and education of the said minor and has had to borrow the sum above expended of \$——— and has therefore requested your petitioner to make application to your Honorable Court for leave to repay her the said sum out of the principal of the minor's estate and thereafter to make payment to her of the income for the future support, maintenance and education of the said minor.

12. The said minor is over the age of fourteen years and has received notice of the intended presentation of this petition and has joined in the prayer thereof.

13. The affidavit of the mother of the said minor as to the facts herein set forth is hereto annexed.

Wherefore your petitioner prays for leave and authority to pay to ———, mother of ———, a minor, out of the principal of his estate the sum of \$——— to reimburse her for expenditures made for the support, maintenance and education of the said minor up to the ——— day of ———, and for leave and authority to pay to the said ——— the income received from the said minor's estate

from the —— day of —— for the support, maintenance and education of the said minor until the further order of the Court.

And your petitioner will ever pray, etc.

—— TRUST COMPANY,

By _____

*Guardian of the Estate of
——, a minor.*

State of Pennsylvania,
City and County of Philadelphia, ss:

—— being duly sworn according to law, deposes and says that he is —— of the corporation petitioner and that the facts set forth in the foregoing petition are true to the best of his knowledge, information and belief.

Sworn to and subscribed before me this
—— day of ——, 1921.

JOINDER.

I, the undersigned ——, being one of the minor children of ——, deceased, over the age of 14, hereby acknowledge that I have received notice of the intended presentation of the foregoing petition, and join in the prayer thereof.

State of Pennsylvania, County of ——, ss:

—— being duly sworn according to law, deposes and says that she is the mother of ——, the minor mentioned in the foregoing petition; that she is familiar with the facts set forth therein and that the same are true to the best of her knowledge, information and belief; that she has received notice of the intended presentation of the foregoing petition and has joined in the prayer thereof.

Sworn to and subscribed before me this
—— day of ——, 1921.

DECREE.

And Now, to wit, this —— day of ——, A. D. 1921, upon consideration of the foregoing petition and on motion of ——, attorneys for the petitioner, the —— Trust Company, guardian

of the estate of ———, a minor, is hereby authorized and empowered to pay to ———, mother of ———, a minor, out of the principal of his estate the sum of \$———, to reimburse her for expenditures made for the support, maintenance and education of the said minor up to the ——— day of ———, and to pay to the said ——— the income received from the said minor's estate from the ——— day of ———, for the support, maintenance and education of the said minor, until the further order of the Court.

By the Court:

J.

**97. PETITION BY GUARDIAN FOR LEAVE TO PAY
INCOME FROM TRUST TO MOTHER FOR ITS
EDUCATION, MAINTENANCE AND SUPPORT.
607.**

In the Orphans' Court of Philadelphia County.

In re Estate of ———, a minor.

——— Term, ———, No. ———.

PETITION FOR LEAVE TO PAY.

To the Honorable, the Judges of the Said Court:

The petition of ———, Guardian of ———, a minor, respectfully represents:

1. That your petitioner was duly appointed guardian of the estate of the said minor, ———, by decree of your Honorable Court dated ———.

2. That said minor by the will of ———, who died ———, is entitled to the income from a legacy of \$——— given and bequeathed unto The ——— Company ———, in trust for the said minor and from which estate there is payable to her quarterly under the terms of the said trust the sum of approximately \$———.

3. ———, the father of said minor, died on ———. ———, the mother of said minor is still living and resides at ——— Street, in the City of Philadelphia; where she maintains a home for the said minor and herself.

4. The said minor has no source of income other than the trust fund as above set forth.

5. Under the terms of the said trust there has been accumulated in the hands of the trustee income in the amount of \$——.

6. The entire amount of the quarterly income from said trust as well as the accumulated income thereon is required by the said minor for her education, maintenance and support in a manner suitable to her station in life and the said minor and her mother have requested your petitioner to present this petition to your Honorable Court for leave to pay the income accumulated and hereafter to be derived from the said trust to the mother of the said minor for her education, maintenance and support.

Wherefore your petitioner prays for leave and authority to pay to ——, the mother of ——, a minor, the income on hand and accrued from the trust under the will of —— and the net income as it may hereafter accrue from the interest of the said minor in the said trust fund until the said minor arrives at the age of twenty-one years or until the further order of the Court.

And your petitioner will ever pray, &c.

Commonwealth of Pennsylvania,
City and County of Philadelphia, ss:

—— being duly sworn according to law, deposes and says that she is the guardian of ——, the said minor, and that the statements contained in the foregoing petition are true to the best of her knowledge, information and belief.

Sworn to and subscribed before me this
—— day of ——, 1920.

JOINDER.

We, ——, the mother of ——, a minor, and ——, the said minor in her own right, do hereby acknowledge that we have received notice of the intended presentation of the foregoing petition and join in the prayer thereof.

DECREE.

And Now, to wit, this —— day of ——, 1920, upon consideration of the foregoing petition and on motion of ——, attorneys for the petitioner, ——, Guardian of the estate of

———, is hereby authorized and empowered to pay to ———, the mother of the said minor, the income on hand and accrued from the trust under the will of ———, and the net income as it may hereafter accrue from the interest of the said minor in the said trust fund until the said minor arrives at the age of twenty-one years or until the further order of this Court.

By the Court:

J.

98. PETITION BY GUARDIAN OF MINOR TO MAKE PAYMENT OF PRINCIPAL IN RELIEF OF DEFICIENCY OF INCOME. 607.

In the Orphans' Court of Philadelphia County.

In re Estate of ———, a minor.

——— Term, ———, No. ———.

PETITION FOR LEAVE TO MAKE PAYMENT OF PRINCIPAL.

To the Honorable, the Judges of the Said Court:

The petition of The ——— Company ———, Guardian of the Estate of ———, a minor, respectfully represents:

1. That your petitioner was appointed Guardian of the said estate by decree of your Honorable Court dated ———.

2. By decree of your Honorable Court dated ———, your petitioner was authorized to lay out and expend and pay over to the mother of the said minor income not exceeding \$——— per year for the support, maintenance and education of the said minor.

3. By decree of your Honorable Court dated ———, the mother of said minor, ———, and the said minor were allowed to occupy premises ——— Avenue, belonging to said estate, free of rent, the net rental thereof to be considered as part of the above allowance.

4. By decree of your Honorable Court dated ———, the above premises ——— Avenue, were sold for a consideration of \$——— in cash over and above the mortgage thereon.

5. That your petitioner has in hand personalty amounting to \$———, from which the approximate net yearly income is

\$——, and the proceeds of the sale of realty in the amount of \$——, from which the approximate net yearly income is \$——. The said minor is entitled to all of the income from the personal estate and to two-thirds of the income from the real estate making for the minor a net annual income of \$—— or thereabouts, and for the mother approximately \$——. These two items are the only sources of income available either for the minor or his mother.

6. During the last year and upwards the mother of said minor, ——, has been almost continuously confined to the —— Hospital, where she has undergone many operations, so that she has been unable to earn anything for the support of herself or her son, and, on the contrary, has been compelled to lay out divers large sums of money for hospital expenses, nurses' and doctors' bills, medicines and surgical dressings, etc., to the extent of \$——.

7. By reason of said illness and its consequent effect upon her earning capacity and increase in living expenses, ——, the mother of said minor, has been compelled to overdraw the income account due the said minor to the extent of \$—— as of ——, of this year.

8. Your petitioner has been notified of the above facts by the said ——, and has investigated same and believes them to be true in all respects, and has been requested by her to present this petition to your Honorable Court.

Wherefore your petitioner prays for leave to pay to the said ——, out of the principal of the personal estate in its hands as Guardian for the said minor, the sum of \$——, of which \$—— shall be used to make up the overdraft of income and \$—— in payment of hospital bills, etc.

And your petitioner will ever pray, &c.

The —— Company ——, Guardian
of the Estate of ——.

By _____

County of Philadelphia, ss:

—— being duly sworn according to law, deposes and says that he is —— of the corporation petitioner, and that the facts

set forth in the foregoing petition are true to the best of his knowledge, information and belief.

Sworn to and subscribed before me this
 _____ day of _____, 1919.

JOINDER.

I, the undersigned, mother of _____, the minor, mentioned in the foregoing petition, do hereby acknowledge that I have received notice of the intended presentation of the said petition and join in the prayer thereof.

(Signature.)

DECREE.

And Now, to wit, this _____ day of _____, 1919, upon consideration of the foregoing petition and on motion of _____, attorneys for the petitioner, it is hereby *Ordered and decreed* that the prayer thereof be granted and The _____ Company _____, Guardian of the estate of _____, a minor, be and the same is hereby authorized and empowered, out of the principal of the personal estate held by it for the benefit of the said minor, to pay the sum of \$_____, whereof \$_____ shall be paid to income to reimburse the same for the overdraft thereon and \$_____ shall be paid to _____, mother of said minor, to reimburse her for the necessary expenses incident to her treatment in the _____ Hospital.

By the Court:

 J.

99. PETITION BY GUARDIAN OF MINOR TO MAKE PAYMENT OF A LUMP SUM OUT OF INCOME TO DEFRAY WEDDING EXPENSES OF MINOR. 607.

In the Orphans' Court of Philadelphia County.

In the matter of the Estate of _____, a minor.
 _____ Term, _____, No. _____.

PETITION FOR LEAVE TO PAY.

To the Honorable, the Judges of the Said Court:

The petition of ———, Guardian of the Estate of ———, a minor, respectfully represents:

1. That your petitioner was duly appointed guardian of the estate of the said minor by decree of your Honorable Court dated ———, after the death of ———, the former guardian.

2. That the approximate value of the estate in the hands of your petitioner as guardian aforesaid is \$———, from which the approximate annual income is \$———. In addition to this the said minor is entitled to income from other funds in the hands of the ——— Company ———, wherein she has no vested right to the principal, of approximately \$——— per year.

3. By decree of your Honorable Court dated ———, during the period when the said ——— was guardian of the said minor, the said guardian was authorized to pay ———, the mother of the said minor, the sum of \$——— per year for her maintenance, education and support.

4. The said minor is at present engaged to be married and will marry ——— on the ——— day of ———, and in order to provide the said minor with a proper trousseau and defray the expenses incidental to the said marriage, ———, the mother of said minor has requested your petitioner to pay her the sum of \$——— out of the income on hand and accrued for the benefit of the said minor from the funds in the hands of your petitioner.

5. Your petitioner is ready and willing to accede to this request, but is not authorized to do so without the approval of your Honorable Court.

6. The said minor has joined in the request, but owing to the shortness of time, it is impossible to secure the formal joinders of the minor and her mother to this petition prior to its presentation to Court.

Wherefore your petitioner prays that he may be authorized and empowered to pay ——— the sum of \$———, from the income arising from the funds in his hands held for the benefit of ———, a minor, the said sum to be used for the purpose of a trousseau and to defray the expenses incident to the marriage of the said minor to ———, said payment to be subject to the execution by the said ——— and the said ———, of a joinder and consent in the form hereto attached which joinder and consent

when executed and received shall be attached hereto and made a part hereof.

And your petitioner will ever pray, etc.

Guardian of the Estate of ———,
a minor.

State of Pennsylvania,
County of Philadelphia, ss:

——— being duly sworn according to law, deposes and says that he is guardian of the estate of ———, a minor, and that the facts set forth in the foregoing petition are true to the best of his knowledge, information and belief.

Sworn to and subscribed before me this
——— day of ———, 1921.

In the Orphans' Court of Philadelphia County.
In the matter of the Estate of ———, a minor.
——— Term, ———, No. ———.

JOINDER.

Republic of France,
United States Consulate:

Personally appeared before me the undersigned, ——— and ———, who being duly sworn according to law, depose and say that they have received notice of the presentation by ———, Guardian of the estate of ———, a minor, of a petition to the Orphans' Court of Philadelphia County, for leave to pay out of the income from the funds in his hands belonging to the estate of the said minor, the sum of \$———, to the said ———, to be used by her for the purchase of a trousseau and to defray the expenses incurred in and about the intended marriage of the said ——— to ———, and hereby consent to the same and join in the prayer thereof.

Sworn to and subscribed before me this
——— day of ———, 1921.

DECREE.

And Now, to wit, this ——— day of ———, 1921, upon consideration of the foregoing petition and on motion of ———,

It is hereby ordered and decreed that the prayer thereof be granted and ———, guardian of the estate of ———, a minor, is authorized and empowered to pay ——— the sum of \$——— from the income arising from the funds in his hands for the benefit of ———, a minor, the said sum to be used for the purchase of a trousseau and to defray the expenses incident to the marriage of the said minor to ———, said payment to be subject to the execution of the said ——— and the said ———, of a joinder and consent in the form hereto attached which joinder and consent when executed and received shall be attached hereto and made a part hereof.

By the Court:

J.

**100. PETITION BY TRUSTEE TO MAKE PAYMENT
TO FOREIGN GUARDIAN. 607.**

In the Orphans' Court of Philadelphia County.

In re Estate of ———, deceased.

——— Term, ———, No. ———.

To the Honorable, the Judges of the Said Court:

The petition of the ——— Company, respectfully represents:

1. That ———, late of the City of Philadelphia, State of Pennsylvania, died ———, having first made and published his last will and testament dated ———, and codicil thereto dated ———, copies of which are annexed hereto.

2. That in and by said will he provided, inter alia, as follows, to wit: (recite terms of trust):

3. That one ———, a resident of the City of ———, New Jersey, duly qualified under the terms of said will as hereinbefore set forth, has heretofore been in receipt of said payment of ——— dollars per annum and is still so entitled to said payment.

4. The said ——— was adjudged a lunatic for whom ——— was duly appointed guardian by the Chancery Court of New Jersey on the ——— day of ———, as appears by exemplified copy of the record of said proceedings annexed to this petition as Exhibit "B."

5. As will appear from the exemplified copy annexed hereto, bond in the sum of ——— dollars has been duly entered as

specific security for the faithful accounting by said guardian for the said payments to him of the said annual sum of ——— dollars as hereinbefore set forth.

Your petitioner, therefore prays for leave and authority to pay to ———, Guardian of ———, a lunatic, the sum of \$—— per annum from the income of the said trust estate of the said ———, known as ———, under the Second Clause of the will of ———, as the same shall from time to time become due and payable.

And your petitioner will ever pray, etc.

County of Philadelphia, ss:

—— being duly sworn according to law, deposes and says that he is —— of The —— Company, and that the facts set forth in the foregoing petition are true to the best of his knowledge, information and belief.

Sworn to and subscribed before me this
—— day of ——, 1919.

DECREE.

And Now, to wit, this —— day of 1919, upon consideration of the foregoing petition and on motion of ——, attorneys for petitioner, the Court grants the prayer thereof and authorizes and directs the —— Company ——, Trustee under the will of ——, to pay to ——, a lunatic, the sum of —— dollars per annum from the income of the said trust estate of the said ——, known as ——, under the Second Clause of the will of ——, as the same shall from time to time become due and payable.

101. PETITION FOR APPOINTMENT OF GUARDIAN AD LITEM FOR MINORS UNDER THE AGE OF 14 YEARS FOR REPRESENTATION IN SALE OF REAL ESTATE. 616.

In the Orphans' Court of Philadelphia County.
In the matter of the Estate of John Doe, deceased.
—— Term, ——, No. ——.

To the Honorable, the Judges of the Said Court:

The petition of Mary Roe and George Roe, by their father and next friend, Richard Roe, respectfully represents:

1. That your petitioners are the children of Jane Roe and Richard Roe, both of whom are living.
2. That your petitioners reside with their parents in Philadelphia, Pennsylvania.
3. That Mary Roe was born on the ——— day of ———, and is now over ——— years of age; that George Roe was born on the ——— day of ———, and is now over ——— years of age.
4. That your petitioners as the children of Jane Roe who was a daughter of Sarah Jones, who was a daughter of the above decedent, have a possible contingent interest in remainder in the estate of the said decedent.
5. That proceedings are now pending before your Honorable Court for the sale of certain real estate wherein it is necessary that your petitioners be represented by a guardian ad litem.
6. That your petitioners have no such guardian and therefore request your Honorable Court to appoint ———, a citizen and resident of Philadelphia County, as guardian ad litem for the purpose aforesaid.

And your petitioners will ever pray, etc.

Mary Roe.

George Roe.

By _____

Their Father and next friend.

Commonwealth of Pennsylvania,
County of Philadelphia, ss:

Richard Roe being duly sworn according to law, deposes and says that he is the father of Mary Roe and George Roe, the minors described in the foregoing petition; that he is familiar with the facts set forth therein and that the same are true to the best of his knowledge, information and belief; that ——— suggested as guardian ad litem is a resident of the City of Philadelphia, and is a person of respectability and property in whom the interests of the said minors may be safely entrusted; that he is neither Executor, Trustee or Administrator of any estate in which the said minors have an interest, nor officer or employe of any

such fiduciary, nor surety on the bond of any such fiduciary, nor officer or employe of any such surety on the bond of any such fiduciary.

Sworn to and subscribed before me this
 _____ day of _____, 1921.

JOINDER.

I, the undersigned, mother of the minors, _____ and _____, hereby acknowledge that I have received notice of the intended presentation of the foregoing petition and join in the prayer thereof.

DECREE.

And Now, to wit, this _____ day of _____, 1921, upon consideration of the foregoing petition and on motion of _____, attorneys for the petitioners, _____ is hereby appointed guardian ad litem for _____ and _____, minors; no security to be entered and no property to come into the hands of the said guardian until the further order of this Court.

By the Court:

J.

102. PETITION FOR APPOINTMENT OF GUARDIAN AD LITEM FOR MINOR OVER THE AGE OF 14 YEARS FOR REPRESENTATION AT AUDIT. 616.

In the Orphans' Court of Philadelphia County.

In re Estate of Joseph Doe, deceased.

_____ Term, _____, No. _____.

To the Honorable, the Judges of the Said Court:

The petition of Emma Roe respectfully represents:

1. That your petitioner is the daughter of William Roe and Marion Roe, his wife, both of whom are living.
2. That she resides with her parents at _____, Philadelphia, Pennsylvania.
3. That she was born on the _____ day of _____, and is now over eighteen years of age.

4. That your petitioner as the daughter of Marion Roe who is a daughter of the above decedent has a possible contingent interest in remainder under the will of the above decedent, a copy of which is annexed hereto as Exhibit "A."

5. That the account of ——— and ———, Trustees is now before your Honorable Court for audit, wherein it is necessary that your petitioner be represented by a guardian ad litem.

6. That your petitioner has no such guardian and therefore requests your Honorable Court to appoint William Blackstone, Esq., as guardian ad litem for the purpose aforesaid.

And your petitioner will ever pray, etc.

State of ———, County of ———, ss:

Emma Roe being duly sworn according to law, deposes and says that she is the petitioner herein and that the facts set forth in the foregoing petition are true to the best of her knowledge, information and belief.

Sworn to and subscribed before me this
——— day of ———, 192——.

State of ———, County of ———, ss:

William Roe being duly sworn according to law, deposes and says that he is the father of the minor, Emma Roe, mentioned in the foregoing petition and that he is well acquainted with the estate of the said minor; that the facts set forth in the foregoing petition are true to the best of his knowledge, information and belief; that William Blackstone, Esq., suggested as guardian, is a member of the Bar and resident of the City of Philadelphia, and is a person of respectability and property in whom the interests of the said minor may be safely entrusted; that he is neither Executor, Trustee or Administrator of any estate in which the said minor has an interest, nor officer or employe of any such fiduciary, nor surety on the bond of any such fiduciary, nor officer or employe of any such surety on the bond of any such fiduciary.

Sworn to and subscribed before me this
——— day of ———, 192——.

JOINDER. -

I, the undersigned, mother of the minor, Emma Roe, hereby acknowledge that I have received notice of the intended presentation of the foregoing petition and join in the prayer thereof.

DECREE.

And Now, to wit, this ——— day of ———, 192——, upon consideration of the foregoing petition, William Blackstone, Esq., is hereby appointed guardian ad litem for Emma Roe, a minor; no money or other property to come into the hands of the said guardian and no security to be entered until the further order of this Court.

By the Court:

J.

103. PETITION BY GUARDIAN FOR LEAVE TO ENTER SECURITY TO RECEIVE AWARD FROM FOREIGN JURISDICTION.

In the Orphans' Court of Philadelphia County.

In the matter of the Estates of ———, minors.

——— Term, ———, No. ———.

PETITION FOR LEAVE TO ENTER SECURITY.

To the Honorable, the Judges of the Said Court:

The petition of The ——— Company ———, respectfully represents:

1. That your petitioner was duly appointed guardian of the estates of the above minors, all of whom are under the age of fourteen years, by decree of your Honorable Court dated ———, without bond, the purpose of said appointment being to receive the minors' share of the estate of their father, ———, deceased, of Philadelphia County, (———), amounting to the sum of \$——— net.

2. The said minors are also entitled to the sum of \$——— now in the hands of the ——— Trust Company of ———, New Jersey, the same being the proceeds from the sale of real estate and said sum being composed as follows: \$———.

3. ———, father of said minors died in ———, leaving to survive him, his widow, ———, who is the sole heir and next of kin of said minors. She has received notice of the intended presentation of this petition and joins in the prayer thereof.

4. All parties in interest desire the transfer of the said fund from the said ——— Trust Company of ———, New Jersey, to your petitioner as guardian of the said minors and to secure same it is necessary that security be entered therefor.

Wherefore your petitioner prays that it be given authority to enter security in your Honorable Court in the sum of \$———, as security for the transfer to your petitioner of the sum of \$———, composed as hereinabove set forth from the ——— Trust Company of ———, New Jersey.

And your petitioner will ever pray, etc.

THE ——— COMPANY, Guardian.

By—————

State of Pennsylvania,
County of Philadelphia, ss:

——— being duly sworn according to law, deposes and says that he is ——— of the corporation petitioner, and that the facts set forth in the foregoing petition are true to the best of his knowledge, information and belief.

Sworn to and subscribed before me this
——— day of ———, 1921.

JOINDER.

I, the undersigned, being the only party in interest, in the foregoing petition other than The ——— Company, Guardian of ———, minors, hereby acknowledge that I have received notice of the intended presentation of the foregoing petition and join in the prayer thereof.

In the Orphans' Court of Philadelphia County.

In the matter of the Estates of ———, minors.

——— Term, ———, No. ———.

DECREE.

And Now, to wit, this ——— day of ———, 1921, upon consideration of the annexed petition and on motion of ———, attorneys for the petitioner, *It is hereby ordered and decreed* that the prayer thereof be granted and that The ——— Company ———, guardian of the estates of ———, be and the same is hereby authorized and empowered to enter security in the sum of \$———, as security for the transfer to the said guardian by the ——— Trust Company of ———, New Jersey, of a fund of \$———, composed of \$———, being the amount due said minors from the sale of certain real estate in New Jersey, and the bond of the said The ——— Company ———, is hereby approved as such security.

By the Court :

J.

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(*So printed in the Act but evidently an error for April 13.)

CITATIONS

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| 1 (a) | 2 | Gilpin v. Brown, 268 Pa. 398, 112 Atl. 124. Stockdale's Est., 29 Dist. 1013. |
| 2 | 4 | Herdle's Est., 29 Dist. 817. Klump's Est., 50 Pa. C. C. 99, 29 Dist. 1004. |
| 10 | 14 | Gilpin v. Brown, 268 Pa. 398, 112 Atl. 124. |
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| | | St. Joseph's Church, 49 Pa. C. C. 315, 16 Sch. 327. |
| 2 (b) | 177 | Patterson v. Reed, 260 Pa. 219, 103 Atl. 735. |
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| (f) | 181 | Behringer's Est., 265 Pa. 111, 108 Atl. 414. |
| 4 | 183 | Act of July 11, 1917, P. L. 790. |
| 8 | 188 | Myers v. Crick, 271 Pa. 399. |
| 12 | 191 | Act of July 11, 1917, P. L. 790. |
| 13 | 192 | St. Joseph's Church, 49 Pa. C. C. 315, 16 Sch. 327. |
| 20 (b) | 206 | Mauch's Est., 47 Pa. C. C. 490, 67 P. L. J. 308, 16 North. 405, 33 York. 45. |

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| 3 | 216 | Perry's Est., 67 P. L. J. 216. Kris' Est., 30 Dist. 166. |
| 5 | 221 | Henninger's Est., 30 Dist. 413. |
| 6 | 222 | Channon's Est., 28 Dist. 479, aff'd in 266 Pa. 417, 109 Atl. 756. Eby's Est., No. 2, 37 Lanc. 329, 30 Dist. 338. McNulty's Est., 29 Dist. 709. |
| 8 (a) | 224 | Boyd's Est., 50 Pa. C. C. 163, 10 West. 47, aff'd in 270 Pa. 504. McLain's Est., 1 Wash. 220. |
| (b) | 225 | Act of June 12, 1919, P. L. 443. Boyd's Est., 50 Pa. C. C. 163, 10 West. 47, aff'd in 270 Pa. 504. McLain's Est., 1 Wash. 220. |
| 9 | 227 | Annear's Est., 29 Dist. 44. |
| 11 | 229 | Duffy's Est., 49 Pa. C. C. 30, 29 Dist. 379. Spark's Est., 30 Dist. 85. |
| 12 | 230 | Rosenfeld v. Wahal, 48 Pa. C. C. 362. |
| 14 | 232 | English's Est. 270 Pa. 1, 112 Atl. 913. Segelbaum's Est., 24 Dauphin 274. |
| 15 (a) | 233 | Garnier v. Garnier, 16 North. 205. Hill's Est., 30 Dist. 477, 69 P. L. J. 177. 348. Moore's Est., 30 Dist. 152, 68 P. L. J. 670, 15 Del. 367. Wagenhorst's Est., 12 Berks 89. |
| (b) | 234 | Fetherolf's Est., No. 2, 29 Dist. 479, 12 Berks 62. Garnier v. Garnier, 16 North. 205. Moore's Est., 30 Dist. 152, 68 P. L. J. 670, 15 Del. 367. Stock's Est., 49 Pa. C. C. 203, 29 Dist. 376. |
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| 15 (c) | 235 | Kane's Est., 69 P. L. J. 820. McNulty's Est., 29 Dist. 709. |
| 16 (a) | 236 | Boyd's Est., 50 Pa. C. C. 163, 10 West. 47, aff'd in 270 Pa. 504. Moore's Est., 30 Dist., 152, 68 P. L. J. 670, 15 Del. 367. |
| (b) | 237 | Boyd's Est., 50 Pa. C. C. 163, 10 West. 47, aff'd in 270 Pa. 504. Hill's Est., 30 Dist. 477, 69 P. L. J. 177, 348. Moore's Est., 30 Dist. 152, 68 P. L. J. 670, 15 Del. 367. |
| 17 | 238 | Greave's Est., 29 Dist. 577. Gruner's Est., 29 Dist. 1095, 49 Pa. C. C. 642. Mulgrew's Est., 69 P. L. J. 169. |
| 20 (a) | 241 | Seiter's Est., 265 Pa. 202, 108 Atl. 614. |
| (b) | 242 | Seiter's Est., 265 Pa. 202, 108 Atl. 614. |
| 21 | 243 | Act of May 20, 1921, (P. L. 937). Boyd's Est., 50 Pa. C. C. 163, 10 West. 47, aff'd in 270 Pa. 504. Greave's Est., 29 Dist. 577. Pfanenschmidt's Est., 35 Montg. 135. Shestack's Est., 267 Pa. 115, 110 Atl. 166. Shoch's Est., 29 Dist. 1163, aff'd in 271 Pa. 158. |
| 23 (a) | 245 | Collom's Est., 47 Pa. C. C. 434, 28 Dist. 503. Dodd's Est., 1 Wash. 236. Flower's Est., 30 Dist. 967. Langerwisch's Est., 47 Pa. C. C. 121, 28 Dist. 470, 8 Leh. 147, aff'd in 267 Pa. 319, 110 Atl. 165. Schreckengost's Est., 77 Super. 235. Young's Est., 1 Wash. 250. |
| (b) | 246 | Lehman's Est., 33 York 113, 8 Leh. 315. Flower's Est., 30 Dist. 967. Young's Est., 1 Wash. 250. |
| (c) | 247 | Flower's Est., 30 Dist. 967. |
| (d) | 248 | Haack's Est., 30 Dist. 669. Flower's Est., 30 Dist. 967. |
| 26 | 252 | Garnier v. Garnier, 16 North. 205. Mulligan's Est., 47 Pa. C. C. 546, 28 Dist. 309. Perry's Est., 67 P. L. J. 216. Young's Est., 1 Wash. 250. |

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| 3 | 262 | Cook's Est., 47 Pa. C. C. 84, 27 Dist. 1006. |
| 4 | 263 | Cook's Est., 47 Pa. C. C. 84, 27 Dist. 1006. Winsor's Est., Pa. C. C. 105, 27 Dist. 1010, 32 York 131, aff'd in 264 Pa. 552, 107 Atl. 888. |
| 5 | 264 | Burtop's Est., 66 P. L. J. 765. Sharpless' Est., 15 Del. 16, 20 Luz. 161, 28 Dist. 746. Wehry's Est., 27 Pa. C. C. 486, 15 Sch. 262, 33 York 68. |
| 8 | 267 | Fleming's Est., 265 Pa. 399, 109 Atl. 265. |
| 9 | 268 | Fleming's Est., 265 Pa. 399, 109 Atl. 265. |

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| (d) | 284 | Alexander's Est., 28 Dist. 993, 33 York 1. |
| 21 (a) | 285 | Burtop's Est., 66 P. L. J. 765. Cook's Est., 47 Pa. C. C. 84, 27 Dist. 1006. Winsor's Est., 47 Pa. C. C. 105, 27 Dist. 1010, 32 York 131, aff'd in 264 Pa. 552, 107 Atl. 886. |
| 24 | 289 | Act of April 16, 1921, P. L. 94. Intestate Act of 1917, P. L. 429. |
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| 1 (a) | 294 | Caldwell v. Caldwell, 70 Super. 332. |
| (b) | 295 | Comm. v. Rife, 50 Pa. C. C. 22. |
| 2 (a) | 296 | Act of July 11, 1917, P. L. 755. Brady's Est., 29 Dist. 24. Carrell's Est., 264 Pa. 140. Collom's Est., 47 Pa. C. C. 434, 28 Dist. 503. Desmond's Est., 28 Dist. 231, 36 Lanc. 217, 8 Leh. 255. Dodd's Est., 1 Wash. 236. Langerwisch's Est., 47 Pa. C. C. 121, 28 Dist. 470, 8 Leh. 147, aff'd in 267 Pa. 319, 110 Atl. 165. McDonald's Est., 49 Pa. C. C. 423, 1 Wash. 10, rev'd in 268 Pa. 486, 112 Atl. 98. McNulty's Est., 29 Dist. 709. Nolan's Est., 68 P. L. J. 588, 2 Erie 111, 21 Lack. 239, 9 Leh. 57. Pfanenschmidt's Est., 35 Montg. 135. Shestack's Est., 267 Pa. 115, 110 Atl. 166. Shoch's Est., No. 1, 271 Pa. 158, aff'g 29 Dist. 1163. Troutman's Est., 30 Dist. 708. Wandall's Est., 29 Dist. 1132. |
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| 5 | 306 | Phillips' Est., 271 Pa. 129. |
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| 10 | 322 | Brodie's Est., 30 Dist. 654. Miles' Est., S. C. Oct. Term 1921, No. 61-2. Wightman's Est., 49 Pa. C. C. 614, 30 Dist. 885, 68 P. L. J. 833. |
| 11 | 323 | Brodie's Est., 30 Dist. 654. Miles' Est., S. C. Oct. Term 1921, No. 61-2. Wightman's Est., 49 Pa. C. C. 614, 30 Dist. 885, 68 P. L. J. 833. |
| 12 | 324 | Brodie's Est., 30 Dist. 654. Miles' Est., S. C. Oct. Term 1921, No. 61-2. |
| 13 | 332 | Miller v. Brown, 49 Pa. C. C. 332. Comm. v. Gross, 35 York 93. |
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| (b) | 339 | Moore's Est., 30 Dist. 152, 68 P. L. J. 670, 15 Del. 367. |
| 18 | 342 | Maurer v. Straub, 16 Sch. 174. Wightman's Est., 49 Pa. C. C. 614, 30 Dist. 885, 68 P. L. J. 833. |
| 19 | 343 | Brodie's Est., 30 Dist. 654. Miles' Est., S. C. Oct. Term 1921, No. 61-2. Wightman's Est., 49 Pa. C. C. 614, 30 Dist. 885, 68 P. L. J. 833. |
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| 3 (d) | 362 | Kiefer v. Jones, 50 Pa. C. C. 269 (s. c. sub nom. Daniel v. Jones), 30 Dist. 633. |
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| 6 (a) | 366 | Twining's Est., 37 Montg. 116. |
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| 7 (a) | 380 | Henry's Est., 30 Dist. 945, 69 P. L. J. 737, 35 York 122. |
| 8 (a) | 382 | Cooper's Est., 29 Dist. 230, 67 P. L. J. 17, 20 Lack. 46, 36 Lanc. 266, 32 York 144. Henry's Est., 30 Dist. 945, 69 P. L. J. 737, 35 York 122. |
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| 8 (d) | 385 | Henry's Est., 30 Dist. 945, 69 P. L. J. 737, 35 York 122. |
| 10 | 391 | Cooper's Est., 29 Dist. 230, 67 P. L. J. 17, 20 Lack. 46, 36 Lanc. 266, 32 York 144. Cotter's Est., 47 Pa. C. C. 76, 27 Dist. 1023, 67 P. L. J. 19. Hayden's Est., 28 Dist. 39. |
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| 13 (a) | 415 | Cochran's Est., 28 Dist. 654. Miller's Est., 264 Pa. 310, 107 Atl. 614. Smith's Est., 49 Pa. C. C. 453, 29 Dist. 917. Tschoopp's Est., 27 Dist. 103, aff'd in 71 Super. 434. |
| 14 | 417 | Bowman's Est., 47 Pa. C. C. 405, 28 Dist. 766, 67 P. L. J. 321, 36 Lanc. 121, 33 York 2. Cullen's Est., 16 Sch. 278. Kearney's Est., 30 Dist. 75. Miller's Est., 264 Pa. 310, 107 Atl. 684. Reel's Est., 65 P. L. J. 689, aff'd in 263 Pa. 248, 106 Atl. 227. |
| 15 (a) | 418 | Act of June 7, 1919, P. L. 412. Cassady's Est., 28 Dist. 37, 32 York 155. Gibb's Est., 30 Dist. 128, 34 York 29. Hoch's Est., 48 Pa. C. C. 149, 28 Dist. 416, 68 P. L. J. 207, 37 Lanc. 98. Kearney's Est., 30 Dist. 75. Kirk v. VanHorn, 265 Pa. 549, 109 Atl. 522. Myers v. Lohr, 66 P. L. J. 665, 19 Lack. 287, 8 Leh. 119, aff'd in 72 Super. 472. Olson's Est., 65 P. L. J. 571, 34 Lanc. 397. Scherrer's Est., 7 West. 109. Smith's Est., 29 Dist. 917, 49 Pa. C. C. 453. |
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| 25 | 471 | Johnston's Est., 264 Pa. 71, 107 Atl. 335. |
| 26 (a) | 474 | Channon's Est., 47 Pa. C. C. 637, 28 Dist. 479, aff'd in 266 Pa. 417, 109 Atl. 756. Cullen's Est., 16 Sch. 278. |
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| 41 (a) i | 528 | In re Trust Funds, 68 P. L. J. 608 (s. c. sub. nom. Hotel Mortgage), 50 Pa. C. C. 82. Legal Investments, 69 P. L. J. 777. |

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| 41 (a) 2 | 529 | Legal Investments, 69 P. L. J. 777. |
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